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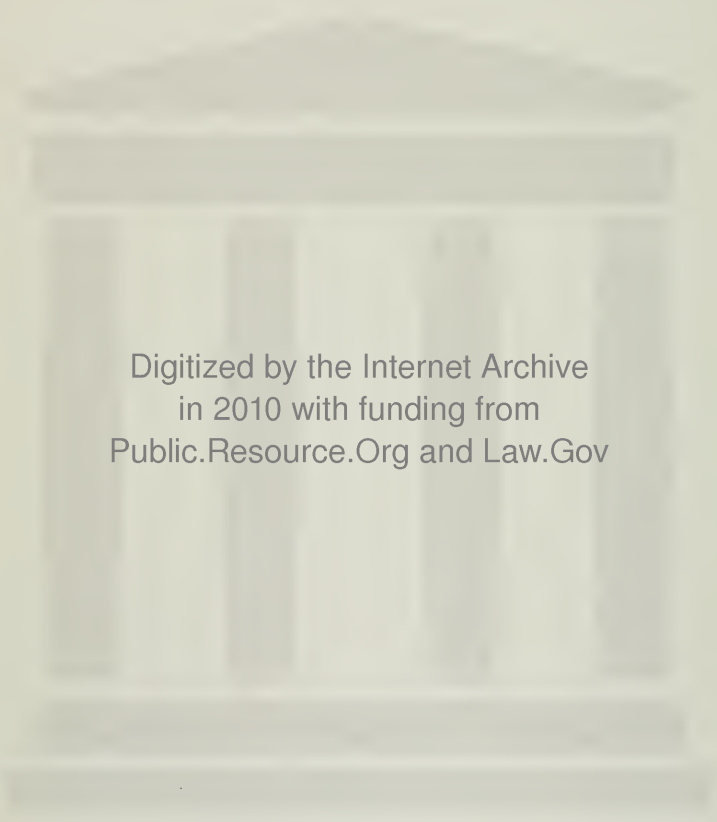
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No. 11445

United States

25-245-4
Circuit Court of Appeals

For the Ninth Circuit.

STUART OXYGEN COMPANY, LTD., a corporation,

Appellant,

vs.

WILLIAM JOSEPHIAN,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 195

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

FEB 20 1947



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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2607 Russ Building,
San Francisco, California.

Attorneys for Defendant and Appellant.

BOYKEN, MOHLER & BECKLEY,

723 Crocker Building,
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the United States District Court
for the Northern District of California,
Southern Division

Civil Action No. 25286-G
Suit for Infringement of
Patent No. 2,317,064

WILLIAM JOSEPHIAN,

Plaintiff,

vs.

STUART OXYGEN CO., LTD.,

Defendant.

COMPLAINT

Now Comes Plaintiff and for cause of action
alleges:

I.

Plaintiff, William Josephian, is a citizen of the
United States and a resident of Oakland, California.

II.

Defendant, Stuart Oxygen Co. Ltd., so Plaintiff
is informed and believes, is a corporation duly
organized and existing under the laws of the State
of California, and has its principal place of busi-
ness at San Francisco, California. [1*]

III.

The jurisdiction of this Court is based upon the
patent laws of the United States.

*Page numbering appearing at foot of page of original certified
Transcript.

IV.

On April 20, 1943, United States Letters Patent No. 2,317,064 were duly and legally issued to Plaintiff for an invention in a tank truck, and since that date Plaintiff has been and still is the owner of those Letters Patent.

V.

Defendant has for a long time past been and still is infringing those Letters Patent by making and using tank trucks embodying the patented invention and will continue to do so unless enjoined by this Court.

VI.

Plaintiff has notified Defendant, both orally and in writing, that the tank trucks manufactured and used by said Defendant are infringements of such Letters Patent.

Wherefore, Plaintiff demands an injunction against further infringement by Defendant, an accounting for profits and damages, and an assessment of costs against defendant.

/s/ WILLIAM JOSEPHIAN,
Plaintiff.

/s/ A. W. BOYKEN of
BOYKEN, MOHLER &
BECKLEY,

/s/ REGINALD L. VAUGHAN,
Attorneys for Plaintiff.

Dated: Nov. 1st, 1946.

[Endorsed]: Filed Nov. 1, 1945. [2]

[Title of District Court and Cause.]

ANSWER

Now comes defendant, and for Answer to the Complaint in the above-identified action denies and alleges as follows:

I.

Answering paragraph I of the Complaint herein, defendant admits the allegations thereof.

II.

Answering Paragraph II of the Complaint herein, defendant admits the allegations thereof.

III.

Answering paragraph III of the Complaint herein, defendant admits the allegations thereof.

IV.

Answering paragraph IV of said Complaint, defendant [3] admits that Letters Patent No. 2,317,064 were issued to plaintiff on April 20th, 1943, for a "Tank Truck"; but defendants have no information or belief upon the remaining allegations and statements of said paragraph of the Complaint sufficient to enable them to answer and therefore deny each and every allegation and statement therein contained which is not herein specifically admitted to be true.

V.

Answering paragraph V of said Complaint, defendant denies each and every allegation and state-

ment made therein; and further answering said paragraph, states that defendant has made and used gas cylinder holders, but that the gas cylinder holders made and used by defendant are entirely different in construction and mode of operation from the tank truck shown and described in the patent sued upon, and defendant's gas cylinder holders do not embody the alleged invention patented in the patent sued upon, nor does the manufacture and use of such gas cylinder holders by defendant infringe any legal and valid claims of the patent in suit.

VI.

Answering paragraph VI of the Complaint, defendant admits the receipt on or about May 9th, 1945, of a letter directed to defendant from one Charles O. Bruce as attorney for plaintiff, which letter alleged infringement of the patent in suit by the manufacture and use by defendant of certain gas cylinder holders; and further answering said paragraph, defendant alleges that on or about May 15th, 1945, defendant responded to the aforesaid letter, stating that defendant's gas cylinder holders did not infringe any claims of the patent in suit; that notwithstanding said response, defendant received a further [4] letter on or about October 26th, 1945, from A. W. Boyken as attorney for plaintiff, alleging infringement of the patent in suit by the manufacture and use by defendant of the aforesaid gas cylinder holders; and that without affording defendant a reasonable opportunity to respond to said last mentioned letter, plaintiff in-

stituted the present suit within one week after the date of transmission thereof.

Further Answering Said Complaint, Defendant Alleges As Follows:

VII.

Defendant alleges that when the scope and meaning of the respective claims of the Letters Patent in suit are determined and resolved by reference to the specification of said Letters Patent and to the art existing at and prior to the alleged invention of the subject matter of the claims of said Letters Patent by the patentee thereof, each and every of the claims will be susceptible only of such narrow interpretation, meaning and scope that no act done or intended to be done by defendant as charged by plaintiff can be held to constitute an infringement of any of the claims of said Letters Patent.

VIII.

Defendant alleges that ever since the grant of the Letters Patent in suit plaintiff has been manufacturing and using the tank truck patented in said Letters Patent, but has failed to give sufficient notice to the public that the same are patented by affixing thereon the word "Patent" together with the number of the patent.

Wherefore Defendant Prays That the Complaint herein may be dismissed [5] with defendant's costs and charges in this behalf most wrongfully sustained.

Dated: December 10th, 1945.

NAYLOR and LASSAGNE,
THEODORE H. LASSAGNE,
THACHER, JONES & CASEY,
THOMAS A. THACHER,
Attorneys for Defendant.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing Answer is acknowledged this 10th day of December, 1945.

BOYKEN, MOHLER &
BECKLEY,
A. W. BOYKEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 10, 1945.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To the Plaintiff Above-Named and to Boyken,
Mohler & Beckley, A. W. Boyken and Reginald
L. Vaughan, His Attorneys:

In accordance with the provisions of Rule 36 of the Federal Rules of Civil Procedure, defendant hereby requests plaintiff to admit the truth of the following facts within ten days after service of this request, for the purposes of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. A truck for handling a plurality of gas cylin-

ders manifolded together as shown in the photographs attached hereto as Exhibits A-1; A-2; A-3; and A-4 was used publicly in Oakland, California, and vicinity, by the [6a] defendant, Stuart Oxygen Co., Ltd., commencing on or about January 1, 1941, and more than one year prior to the filing of application for the patent in suit.

2. A holder for a plurality of gas cylinders manifolded together as shown in the photograph attached hereto as Exhibit B-1, and a truck for handling said holder as shown in the photographs attached hereto as Exhibits B-2 and B-3 were publicly used in Los Angeles, California, and vicinity by Home Oxygen Company commencing on or about January 1, 1941, and more than one year prior to the filing of application for the patent in suit.

3. Holders for gas cylinders as indicated by red arrows on the photographs attached hereto as Exhibits C-1; C-2; C-3; and C-4 were publicly used in the City and County of San Francisco, California; in South San Francisco; San Mateo County, California, and vicinity, by Western Pipe and Steel Company commencing on or about February 15, 1940, and more than one year prior to the filing of application for the patent in suit.

Dated: January 16th, 1946.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
THACHER, JONES & CASEY,
/s/ THOMAS A. THACHER,
Attorneys for Defendant.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing is acknowledged this 16th day of January, 1946.

BOYKEN, MOHLER &
BECKLEY,

/s/ A. W. BOYKEN,

/s/ REGINALD L. VAUGHAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 17, 1946. [6b]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

An injunction may issue as prayed for in the complaint, with costs to plaintiff.

The Court is of the opinion that the evidence does not warrant an order for an accounting for profits and damages and that the injunctive relief allowed is the proper remedy.

Dated: May 6, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed May 6, 1946. [7]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the Court on April 30 and May 1, 1946, and witnesses having testified in open Court on behalf of the respective parties, and evidence submitted, and arguments having been made by the attorneys for both parties, and said cause having been submitted to the Court,

Now, therefore, the Court having been fully advised and having entered its Order for Judgment, dated May 6, 1946, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This cause was brought on November 1, 1945 under the Patent Laws of the United States for the infringement of United States Letters Patent No. 2,317,064 issued April 20, 1943 to William Josephian. [8]

2. Plaintiff, William Josephian, was at the time this action was brought and still is a resident of Oakland, California.

3. Defendant, Stuart Oxygen Co., Ltd., was at the time this action was brought and still is a corporation duly organized and existing under the laws of the State of California and had at the time this action was brought and still has its principal place of business in San Francisco, California.

4. The invention disclosed and claimed in United States Letters Patent No. 2,317,064 is the sole invention of William Josephian and was, at the time made by him, new and useful; and the said patent and invention are now owned by him.

5. The device disclosed in said patent is novel and useful in that heavy cylinders are grouped together in a unit, movable by one man, and the unit possesses such maneuverability without losing balance and tipping over.

6. Plaintiff, William Josephian, has, since January 1942, made and used many hundreds of devices embodying the invention in said Letters Patent in his oxygen business.

7. The said patent was issued by the United States Patent Office without citing any prior art and with seven of the eight claims originally included in the application.

8. None of the devices shown in the photographs introduced in evidence as defendant's Exhibits A-1, A-2, A-3, B-1, B-2, B-3, B-4, C-1, C-2, C-3 and C-4, show the structure disclosed in said Letters Patent nor do any have the means to permit maneuvering of the unit as set forth in said Letters Patent.

9. No other prior uses, inventions, knowledge, or art, other than the defendant's exhibits mentioned in paragraph 8 above, were submitted for the Court's consideration either by the pleadings or the evidence.

10. The defendant has, since 1945, manufac-

tured and used approximately one hundred (100) devices like that in evidence as [9] plaintiff's Exhibit 7, for which has been substituted herein Photographs 7A and 7B filed May 13, 1946, which devices accomplish the same result as the device disclosed in said Letters Patent in substantially the same way.

11. Jack Molinari assisted William Josephian in constructing units of the invention disclosed and claimed in said Letters Patent and later was employed by defendant to design and construct for the defendant units like plaintiff's Exhibit 7; and said Molinari and defendant's employees did design and construct said units with knowledge of the plaintiff's invention and Letters Patent.

12. Plaintiff's Exhibit 7 has a "second stable position" when resting simultaneously on the edge of the base plate and on the circular depression formed in said base plate.

13. Plaintiff's Exhibit 7 will remain in a stationary stable position when resting simultaneously on the edge of the base plate and on the circular depression formed in said base plate, if the floor or other support on which the unit rests is raised as little as $\frac{3}{16}$ inches at the point of contact of said depression with said floor or other support.

14. The circular depression in the bottom of the base plate of plaintiff's Exhibit 7, for which has been substituted herein photographs 7A and 7B, is the substantial equivalent of and performs

the same function as the circular track disclosed in said Letters Patent.

Conclusions of Law

1. This Court has jurisdiction of the parties and subject matter herein.

2. Plaintiff is the legal owner of United States Letters Patent No. 2,317,064.

3. United States Letters Patent No. 2,317,064 are good and valid in law. [10]

4. The phrase "stable position", as used in said Letters Patent, refers to a position occupied by said truck in which a material increase in force is required to cause further motion of said truck in the direction of upset.

5. Defendant has, with knowledge and notice of said Letters Patent, infringed claims 1, 2, 3, 4 of United States Letters Patent No. 2,317,064 by manufacturing and using devices like that in evidence as plaintiff's Exhibit 7, for which has been substituted herein Photographs 7A and 7B filed May 13, 1946.

6. Defendant, its agents, servants, employees, attorneys and those in active concert with or participating with it, shall be perpetually enjoined and restrained (1) from directly or indirectly infringing upon United States Letters Patent No. 2,317,064, (2) from making or causing to be made, or selling or causing to be sold, or using or causing to be used, devices like or similar to that in evidence

as plaintiff's Exhibit 7, for which has been substituted herein Photographs 7A and 7B filed May 13, 1946, and (3) from disposing of such devices as defendant may now possess as complete units or with knowledge that they shall be subsequently used.

7. Plaintiff shall recover from defendant, Stuart Oxygen Co., Ltd., his costs of suit and disbursements.

/s/ LOUIS E. GOODMAN,
Judge.

Not approved as to form:

/s/ NAYLOR & LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

Receipt of a copy of the above is acknowledged this 13th day of May, 1946.

/s/ NAYLOR & LASSAGNE,
Attorneys for Defendant.

[Endorsed]: Filed May 23, 1946. [11]

In the United States District Court for the
Northern District of California
Southern Division

Civil Action No. 25286-G
Suit for Infringement of
Patent No. 2,317,064

WILLIAM JOSEPHIAN,

Plaintiff,

vs.

STUART OXYGEN CO., LTD.,

Defendant.

FINAL JUDGMENT

This cause having been heard by this Court on the pleadings herein and thereupon, upon consideration thereof, the Court having entered its Order for Judgment and its Findings of Fact and Conclusions of Law, it is now

Ordered, adjudged and decreed as follows:

1. That plaintiff is the legal owner of United States Letters Patent No. 2,317,064 issued April 20, 1943 to plaintiff and that said Letters Patent are good and valid in law.

2. That defendant has since 1945 infringed said Letters Patent by making and using devices like that introduced in evidence as plaintiff's Exhibit 7 for which has been substituted photographs 7A and 7B filed May 13, 1946. [12]

3. A writ of injunction shall issue under the

seal of this Court directed against the defendant, its agents, servants, employees, attorneys, and those in active concert or participating with it perpetually enjoining and restraining them (1) from directly or indirectly infringing said Letters Patent, (2) from making or causing to be made, selling or causing to be sold, or using or causing to be used devices like or similar to that in evidence as Plaintiff's Exhibit 7 for which has been substituted photographs 7A and 7B filed May 13, 1946, and (3) from disposing of such devices as defendant may now possess as complete units or with knowledge that they shall be subsequently used.

4. That the plaintiff herein recover from said defendant the costs in this case to be taxed up to and including the entry of this judgment and the issuance and service on defendant of the injunction herein provided; and that execution issue therefor.

5. The costs shall be taxed at \$172.89.

/s/ LOUIS E. GOODMAN,
Judge.

Dated: May 23, 1946.

[Endorsed]: Filed and entered May 23, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73(b) OF
RULES OF CIVIL PROCEDURE

Notice is hereby given that Stuart Oxygen Company, Ltd., the defendant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the parts of the final judgment entered in this action on May 23rd, 1946, which adjudge as follows:

“2. That defendant has since 1945 infringed said Letters Patent (No. 2,317,064) by making and using devices like that introduced in evidence as plaintiff’s Exhibit 7 for which has been substituted herein photographs 7A and 7B filed May 13, 1946.

“3. A writ of injunction shall issue under the seal of this Court directed against the defendant, its agents, servants, employees, attorneys, and those in active concert or participating with it perpetually enjoining and restraining [14] them (1) from directly or indirectly infringing said Letters Patent, (2) from making or causing to be made, selling or causing to be sold, or using or causing to be used devices like or similar to that in evidence as Plaintiff’s Exhibit 7 for which has been substituted herein photographs 7-A and 7-B filed May 13, 1946, and (3) from disposing of such devices as defendant may now possess as complete units or with knowledge that they shall be subsequently used.

“4. That the plaintiff herein recover from said defendant the costs in this case to be taxed up to

and including the entry of this judgment and the issuance and service on defendant of the injunction herein provided; and that execution issue therefor.”

Dated: July 19th, 1946.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

THATCHER, JONES & CASEY,
THOMAS A. THATCHER,
Of Counsel.

[Endorsed]: Filed July 19, 1946. [15]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75

The defendant-appellant above named, in compliance with Rule 75 of the Federal Rules of Civil Procedure, hereby designates for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action.

Dated July 19th, 1946.

NAYLOR AND LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

THATCHER, JONES & CASEY,
THOMAS A. THATCHER,
Of Counsel.

Acknowledgment of Service

Receipt of a copy of the foregoing Designation of Contents of Record on Appeal under Rule 75 is acknowledged this 19th day of July, 1946.

BOYKEN, MOHLER &
BECKLEY,
W. BRUCE BECKLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 20, 1946. [16]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know all men by these presents:

That The Travelers Indemnity Company, of Hartford, Connecticut, a stock insurance company duly licensed to transact business in the State of California, is held and firmly bound unto William Josephian, plaintiff in the above-entitled case, in the full and just sum of Five Thousand Two Hundred Fifty Dollars (\$5,250.00) to be paid to said plaintiff, his executors, administrators, or assigns, for which payment well and truly to be made The Travelers Indemnity Company binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such:

That whereas Stuart Oxygen Company, Ltd., a corporation duly organized and existing under the laws of the State of California, is about to take an appeal to the United [17] States Circuit Court

of Appeals for the Ninth Circuit to reverse the judgment made and entered on May 23rd, 1946 by the United States District Court for the Northern District of California, Southern Division, in the above-entitled case.

Now, therefore, if the above-named Stuart Oxygen Company, Ltd., shall prosecute said appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed, and dated this 19th day of July, 1946.

THE TRAVELERS
INDEMNITY COMPANY,
By D. L. CLARK,
Attorney in Fact.

Bond No. 123579.

Examined and recommended for approval.

THEODORE H. LASSAGNE,
Attorney for Appellant.

Bond approved July 22, 1946.

GOODMAN,
District Judge.

(Verification of surety.)

[Endorsed]: Filed July 22, 1946. [18]

[Title of District Court and Cause.]

WRIT OF INJUNCTION

The President of the United States of America, to
Stuart Oxygen Co., Ltd., a corporation, defendant
above named, its agents, servants, employees,
attorneys, those in active concert or
participating with it, and all those claiming by,
through or under it.

Greetings:

Whereas, by a decree and final judgment entered
herein on May 23, 1946, it appears that United
States Letters Patent No. 2,317,064 is valid and
infringed by defendant and by said judgment it
was ordered that a perpetual injunction issue out
of and under the seal of this Court against the
defendant, Stuart Oxygen Co., Ltd., its agents,
servants, employees, attorneys, and those in active
concert and participating with it.

Now, therefore, you are hereby perpetually en-
joined and restrained:

(1) From directly or indirectly infringing said
letters Patent, [19]

(2) From making or causing to be made, selling
or causing to be sold, or using or causing to be used
devices like or similar to that in evidence as Plain-
tiff's Exhibit 7, and

(3) From disposing of such devices as you may

now possess as complete units or with knowledge that they shall be subsequently used.

Witness, the Honorable Louis E. Goodman, Judge of the United States District Court for the Northern District of California, and the seal of said Court affixed this 19th day of July, 1946.

[Seal] /s/ C. W. CALBREATH,
Clerk.

(Return of service of writ.)

[Endorsed]: Filed July 23, 1946. [20]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO
VACATE SUPERSEDEAS BOND

Please take notice that the undersigned will move this Court, at Room 258, United States Post Office Building, San Francisco, on the 5th day of August, 1946, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order vacating the Supersedeas Bond dated July 19, 1946 and the approval granted by this Court on July 22, 1946 and for an order setting forth the conditions under which supersedeas will be granted.

The grounds for such motions are that the present bond is insufficient in the following particulars:

1. Plaintiff was not given notice as to when defendant would move the Court for approval.

2. The conditions set forth in the present bond do not conform to the statements made in open court on June 10, 1946 and as set forth in a letter of the same date from plaintiff's attorney to defendant's attorney, a copy of which is attached hereto.

A draft of the order requested is submitted herewith.

See Moore's Federal Practice, Vol. 4, pp. 664-665.

BOYKEN, MOHLER &
BECKLEY,
A. W. BOYKEN,
W. BRUCE BECKLEY,
REGINALD L. VAUGHAN,
Attorneys for Plaintiff.

Receipt of a copy of the above acknowledged this 24th day of July, 1946.

NAYLOR AND LASSAGNE,
THEODORE H. LASSAGNE,
Attorneys for Defendant.

[Endorsed]: Filed July 24, 1946. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING
APPEAL

Good cause appearing therefor, attendant upon the preparation of the transcript of the record on appeal, it is hereby

Ordered that the time for docketing the appeal in the above-entitled cause may be and the same is hereby extended to and including September 27th, 1946.

Dated: August 27, 1946.

A. F. ST. SURE,
U. S. District Judge.

No previous extension by order or stipulation.

NAYLOR & LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 27, 1946. [23]

[Title of District Court and Cause.]

ORDER STAYING INJUNCTION AND
FIXING TERMS OF STAY BOND

Defendant having taken an appeal from the final judgment entered herein enjoining defendant from further infringing the patent in suit, now, therefore, in accordance with Rule 62(c) of the Federal Rules of Civil Procedure, it is hereby

Ordered that said injunction be and the same is hereby suspended during the pendency of said appeal, but only on the following conditions:

That defendant, within five days, furnishes a good and sufficient undertaking conditioned that defendant will pay to plaintiff, if said appeal is

dismissed or if the [24] judgment herein is affirmed, a royalty for all infringing devices made, used or sold by defendant during pendency of appeal, in an amount to be fixed by the court, after notice to the parties, not exceeding, however, the total sum of \$5,000.00.

Dated: September 23, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 23, 1946. [25]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR
FILING UNDERTAKING

It is hereby stipulated by and between the parties hereto, by their attorneys, that the Defendant may have to and including October 3, 1946, within which to file the undertaking required by the Order of this Court dated September 23, 1946, in this action.

Dated: This 25th day of September, 1946.

BOYKEN, MOHLER &
BECKLEY,
MARK MOHLER,
Attorney for Plaintiff.

THEODORE H. LASSAGNE,
Attorney for Defendant.

[Endorsed]: Filed Sept. 26, 1946. [26]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellant herein may have to and including October 17, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 27, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 27, 1946. [27]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That The Travelers Indemnity Company, of Hartford, Connecticut, a stock insurance company duly licensed to transact business in the State of California, is held and firmly bound unto William Josephian, plaintiff in the above entitled-case, in the full and just sum of Five Thousand Two Hundred Fifty Dollars (\$5,250.00) to be paid to said plaintiff, his executors, administrators, or assigns, for which payment well and truly to be made The Travelers Indemnity Company binds itself, its successors and assigns firmly by these present.

The condition of the above obligation is such:

That whereas Stuart Oxygen Company, Ltd., a

corporation duly organized and existing under the laws of the State of California, is about to take an appeal to the United [28] States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered on May 23rd, 1946 by the United States District Court for the Northern District of California, Southern Division, in the above-entitled case.

Now, therefore, if the above-named Stuart Oxygen Company, Ltd., shall prosecute said appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, and shall pay to plaintiff a royalty for all infringing devices made, used or sold by defendant during pendency of the appeal, in an amount to be fixed by the court, after notice to the parties, not exceeding, however, the total sum of Five Thousand (\$5,000.00) Dollars, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed, and dated this 19th day of July, 1946.

THE TRAVELERS INDEMNITY COMPANY,

(Seal) /s/ By D. L. CLARK,
Attorney in Fact.

Bond No. 123579.

Examined and recommended for approval,
/s/ THEODORE H. LASSAGNE,
Attorney for Appellant.

Approved:

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

(Verification of Surety.)

[Endorsed]: Filed Oct. 2, 1946. [29]

[Title of District Court and Cause.]

ORDER APPROVING SUPERSEDEAS BOND

Defendant having filed herein a Supersedeas Bond conditioned as provided in the Order Staying Injunction and Fixing Terms of Stay Bond dated September 23, 1946:

It is hereby ordered:

1. That the said Supersedeas Bond be and the same is hereby approved; and

2. That the previously filed Supersedeas Bond approved by this Court on July 22nd, 1946 be and the same is hereby exonerated, and the original thereof may be delivered to defendant.

Dated at San Francisco, California, this 2nd day of October, 1946.

LOUIS E. GOODMAN,
U. S. District Court Judge.

[Endorsed]: Filed Oct. 2, 1946.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL PAPERS AND EXHIBITS

It appearing that it is desirable that certain original papers and exhibits on file in the above-identified action should be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof, a Notice of Appeal to that Court having been filed in this action:

It is hereby ordered, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals of the Ninth Circuit:

1. Request for Admissions;
2. Substitution of Photographs for Physical Exhibits; [31]
3. Original transcript of testimony given and proceedings had at the trial; and
4. Originals of all exhibits

which papers and exhibits may be held by the Clerk of the Circuit Court of Appeals for the Ninth Circuit pending the appeal, and to be returned to the Clerk of this Court thereafter unless otherwise provided by rule or order of said appellate court.

It is further ordered that, pursuant to the stipulation of the parties, defendant-appellant need not file two copies of the Reporter's Transcript as provided for in Rule 75(b).

Dated at San Francisco, California, this 2nd day of October, 1946.

LOUIS E. GOODMAN,
U. S. District Judge. [32]

[Title of District Court and Cause.]

STIPULATION RE TRANSCRIPT

It is hereby stipulated by the parties hereto, by their attorneys, that in the matter of the pending appeal herein defendant-appellant need not file two copies of the Reporter's Transcript as provided for in Rule 75(b).

Dated at San Francisco, California, this 7th day of September, 1946.

NAYLOR & LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

BOYKEN, MOHLER &
BECKLEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 2, 1946. [33]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered 1 to 33, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of William Josephian, Plaintiff, vs. Stuart Oxygen Co., Ltd., Defendant, Civil No. 25286 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 14th day of October A. D. 1946.

(Seal)

C. W. CALBREATH,
Clerk,

/s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Tuesday, April 30, 1946

Appearances:

For Plaintiff A. W. Boyken, Esq., Reginald L. Vaughan, Esq., W. Bruce Beckley, Esq.

For Defendant: Theodore H. Lassagne, Esq. and Messrs. Thacher, Jones & Casey. By Harrison A. Jones, Esq.

The Clerk: Josephian vs. Stuart Oxygen Co.

Mr. Boyken: Ready for the plaintiff.

Mr. Lassagne: Ready for the defendant. [1*]

WILLIAM JOSEPHIAN

the plaintiff, called in his own behalf; sworn.

The Clerk: Will you state your name?

A. William Josephian.

Direct Examination

Mr. Boyken: Q. Mr. Josephian, are you the plaintiff in this action? A. Yes, sir.

Q. And your name is William Josephian?

A. Yes, sir.

Q. You reside in Oakland, California?

A. Yes.

Q. What line of business are you in?

A. In the manufacture of oxygen gas and acetylene——

Q Under what name?

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of William Josephian.)

A. Pacific Oxygen Company.

Q. What is the address of the Pacific Oxygen Company?

A. 2205 Magnolia Street, Oakland 7, California.

Q. Was Patent No. 2,317,064 issued to you?

A. Yes.

Q. Are you still the owner of that patent?

A. Yes.

Mr. Boyken: I would like, if your Honor will permit, to introduce the patent in evidence and ask it be marked.

Mr. Lassagne: No objection.

The Court: Mark it Plaintiff's Exhibit 1.

(Patent No. 2,317,064 was thereupon received in evidence [13] and marked Plaintiff's Exhibit No. 1.)

Mr. Boyken: Q. When did you organize the Pacific Oxygen Company?

A. First made application for the name Pacific Oxygen Company in June, 1936, but I didn't get into production and made no deliveries until March of 1937.

Q. Are you the sole owner of that business?

A. Yes. [13a]

Q. What business were you in before you commenced selling oxygen?

A. I used to be in the ice business.

Q. Now, you started in with a very small capital, I understand.

A. Well, it was very small compared to my competitors.

(Testimony of William Josephian.)

Q. But it has increased since, hasn't it, the capital? A. Yes, sir.

Q. What is oxygen used for in commercial operations?

A. Well, it is mostly used for welding and the cutting of steel, especially in steel fabrication shops, where steel is processed, they use oxygen in the work.

Q. Could you develop that a little further? In what way do they use the oxygen?

A. Well, whenever they want to cut a piece of steel they merely light a torch and they apply the heat of the flame and then a stream of oxygen after the metal is heated. It has a tendency to burn the oxygen right through, and you can cut through, say, a half inch or a three-quarter inch piece of steel several feet per minute, and it is really a very handy tool so far as steel fabrication is concerned.

Q. With respect to welding, how is it used?

A. In welding operations it is used with an acetylene torch, which is simply a nozzle where the oxygen and acetylene mixture makes a very hot flame. The temperature of the flame is something over 5500 degrees to 6000 degrees, which melts the steel—it has only a melting point of, say, 2400 degrees, and makes it a [14] homogeneous or one solid mass.

Q. We have in the court a full sized set of oxygen tanks. How much do these tanks weigh? Let us take the individual oxygen tank, how much does that weigh?

(Testimony of William Josephian.)

A. One individual tank—they have several different alloys of steel. The very lightest tank you can buy of that size is about 110 pounds, and then the heaviest you can buy is about 130 pounds empty. It usually takes 18 to 20 pounds of oxygen to fill a cylinder.

Q. Just take these oxygen tanks that have been exhibited in the courtroom which are yours. How much do those individual tanks weight empty?

A. Empty they will weigh 120 pounds each.

Q. And these happen to be empty?

A. Yes.

Q. And so taking a unit of four of these as they have been shown here in the courtroom together with the fittings, the base and the top fittings, how much does the whole unit weigh here, would you say?

A. It weighs about 520 pounds, and there is about 84 pounds of oxygen in it by weight.

Q. Now, the oxygen is under heavy pressure when it is in the tank? A. Yes.

Q. What is that pressure?

A. Well, these particular cylinders are filled to 2265 pounds pressure per square inch at 70 degrees Fahrenheit.

Q. That is the reason for having these tanks so heavy, is it not? A. That's right.

Q. Now, on a typical job where you move oxygen out on a job, [15] how are these tanks arranged?

(Testimony of William Josephian.)

A. Do you mean when they are in units, or when they are individual cylinders?

Q. I have shown the court a photograph—if I may have that—do you happen to know what particular job that was (handing a photograph to the witness).

A. Well, this job is the Bacon Vulcanizer Company.

Q. I didn't get that name.

A. Bacon Vulcanizer Company, in Oakland.

Q. And when was the photograph taken?

A. About a year or so ago. I don't recall exactly.

Q. Is that one of your installations?

A. Yes.

Q. Will you explain how those tanks are arranged as shown in that photograph?

A. Well, these units are manifolded with 8000 cubic feet or eight of those units in one row. There are two rows, which this photograph shows. The customer uses the gas from one side, and when it becomes empty he can shut it off and then use the oxygen from the other side. Our delivery truck in the meantime will come by, pick up the empty units, put in full units, and then he is serviced for the next operation, or until he uses up the other side.

Q. Is that a photograph of one of your typical installations? A. Yes.

Q. And that utilizes the invention in this patent?

A. Yes.

(Testimony of William Josephian.)

Mr. Boyken: I think I might as well at this time introduce in evidence the photograph. [16]

Mr. Lassagne: I will object to that at this time on the ground there is no showing by way of evidence of any correspondence between the units shown in that photograph and the structure covered by the patent. The witness is not an expert who can testify it embodies the invention of the patent, and there has been no testimony at all establishing the correspondence of these painted units which are the type shown in the photograph, with the type covered by the patent.

Mr. Boyken: It is for illustration only. I asked the witness if this was one of his installations and he said yes.

The Court: I think what counsel was objecting to was the added expression you put in, whether or not it embodied the invention.

Mr. Boyken: I will leave that part out of it, then.

Q. I will ask you if this is one of your installations? A. Yes, sir.

Q. And this illustrates your testimony about manifolding these tanks together so that they operate as a unit? A. Yes.

Mr. Boyken: I then offer it in evidence as Plaintiff's Exhibit 2.

Mr. Lassagne: There is no objection to it as illustrating that testimony.

(The photograph was marked Plaintiff's Exhibit 2 in evidence.)

(Testimony of William Josephian.)

Mr. Boyken: Q. Now, on the job which is the one shown [17] in that photograph, Plaintiff's Exhibit 2, how are the oxygen tanks moved out to the job from your plant?

A. Well, they are moved out on a truck.

Q. First you make the oxygen right there at your plant? A. That is right.

Q. Then what do you do next?

A. Well, they are charged into units, and after they are charged into units they are carried out to the jobs and hooked on the manifold, and the customer uses it for a manifold. That prevents the necessity of a customer using any cylinders or in any way bothering himself with moving tanks through his premises.

Q. I want to follow in detail how this oxygen is moved out from your plant to the job. First you make the oxygen and then you put the oxygen in these tanks? A. Yes.

Q. Into these units, such as the one that is here in the courtroom, where there are four tanks?

A. Yes.

Q. Fastened together in this form?

A. Yes.

Q. And then these units are put on trucks at your plant? A. Yes.

Q. And then they are moved out to the place where they are to be used, the job, is that right?

A. That is right.

Q. Tell us what is done when they get out there

(Testimony of William Josephian.)

to the job? What is the first thing? You take them off the truck, don't you?

A. Take them off the truck, bring them up to the manifold. [18]

Q. You bring them up to the place where they are to be used? A. Yes.

Q. Such as the spot shown on this photograph?

A. Yes.

Q. Then what is done?

A. Then the cylinder—the unit it seems as though is never exactly in line, so you have to rotate it, move it around, either one way or the other, so the connection can be made to a copper pigtail, and if you were not able to move the unit, then you would have to bend the pipe back and forth, and in a short time you would have broken your copper tubing.

Q. How many men do you have out there at the job to move these units? A. One man.

Q. Take this unit that is before you, which is too large to put in evidence, but that comes to the job. Now, one man handles that? A. Yes.

Q. What does he do with it? How does he handle it?

A. Well, he wheels it over and hooks it up to the manifold.

Q. What difficulty is there in doing that?

A. The unit is so designed that he can move it around, but it has a stable position so he can't pull it over or it can't get out of control. You see, this apparatus is quite heavy, and once it starts falling,

(Testimony of William Josephian.)

the weight increases and will surely drag a person to the ground and is liable to hurt someone.

Q. Can you illustrate that by coming down here and moving this very slight, because we are in a courtroom, here, but just show [19] that motion. Just do it to a small degree.

A. Now, if I want to move it over this way (indicating), or if I want to move it back (indicating)—but suppose I get this over and then all of a sudden it started coming over. Well, you see, I would have to pull it. It won't come over until I get to that position to pull it over. If that was on the very edge it started over, then it would be probably like this and then—you see, quite a bit of pressure comes down. Unless a man were up against it he is liable to get ruptured or get himself hurt.

Q. What enables you to move that around in the way you did without having it upset? I think you can resume your seat, Mr. Josephian.

A. It is the circular track on the bottom plate in relation to the bottom plate.

Q. Did you make these two little wooden models that I have exhibited to the court?

A. Well, I ordered them made at our shop by the man in the back. I can't say I actually did the work.

Q. They were made in your shop under your direction? A. Yes.

Q. The one that I hold in my hand, does that illustrate your device?

(Testimony of William Josephian.)

A. That is a small model.

Q. Of what you just handled in the courtroom?

A. Yes, sir.

Q. Will you take this model and show the court just what happens when you move that big device, and what enables you to move it without upsetting?

A. You see, this—— [20]

The Court: You will have to speak so the reporter can hear it.

The Witness: This circular track, the diameter of it is made in relation to the outer plate, so that the weight balance—it doesn't take much pressure to move it and pull it in such a position that it can be moved around. The idea is so that one man can move it around without a lot of work. But the main thing we have to worry about is the safety angle, because should this thing go out of control and come over too far, then it would come on down, and unless a man were there to catch it, he would hurt himself, so it is provided with a second stable position where it comes over so far and then you have to pull it a little farther in order to get it out of balance.

Mr. Boyken: Q. In other words, for the purpose of the record, in order to move that you first tilt it, somewhat, do you not? A. Yes.

Q. And then in that tilted position you can turn it easily—I mean its maneuverability, is that right?

A. Yes.

Q. What prevents it from actually turning over

(Testimony of William Josephian.)

then? Is there an extra force that is necessary to actually turn it over, to upset it?

A. Yes, the practice is to make that base relative to the bottom plate so that there is a second stable position, so that it can't come over unless you put additional force on it.

Q. So in the ordinary moving of that there is no danger of [21] upsetting, is that the point?

A. That is right.

The Court: We will take the morning recess at this time.

(Recess.)

Mr. Boyken: Q. You spoke of moving these units into position. Now, you could also move the individual tanks into position, could you not?

A. Yes, you could.

Q. What is the advantage in the form that you have here in court over the moving of individual tanks?

A. Well, you handle all four cylinders just like you would handle one cylinder, so it gives you 300 per cent more advantage.

Q. What about the base and the track in your invention as against the single cylinders? How are these single cylinders, if you took them out of this cluster here—what does the bottom look like of the single cylinder?

A. The bottom is slightly rounded. They are slightly smaller in diameter in a single cylinder because in handling the cylinder it is not practical to have sharp lines. It comes at a slightly smaller

(Testimony of William Josephian.)

angle. The cylinder can be tipped over, but there is so little difference in weight it doesn't make any difference. A man can hold it up no matter what position it is in. It is only 130 or 140 pounds, and even if it is lying down you can easily pick it up.

Q. So as a practical man what are the advantages in your invention as compare to handling single cylinders?

A. Well, you can handle four cylinders for the work of one cylinder. [22]

Q. What else? How about spotting the cylinders?

A. Spotting of the cylinders is no easier with that unit than it is with an individual cylinder. After all, you can move an individual cylinder very easily.

Q. It is largely a matter of saving time?

A. That is right.

Q. And it enables you to position four cylinders at a time in its proper place? A. Yes.

Q. Now, the photograph showed quite an installation. Do you also sell to small shops?

A. Yes. These units are used in operations where a customer may use from three of these a month, ten a month, up to a thousand a month. We had one customer who used a thousand of these units of oxygen a month.

Q. When you talk about a unit you mean four cylinders together? A. Yes.

Q. In the form that is here in the courtroom?

A. Yes, sir.

(Testimony of William Josephian.)

Q. How many of those units does your company own at the present time? A. 500.

Q. While I am on the subject, formerly, I understand, you did not put the patent number on there, but you have recently put it on?

A. Yes.

Q. When did you stop?

A. The early part of last year.

Q. Now, why couldn't you take a cluster of four cylinders like that and put it on some kind of a truck and wheel it into position? What is the advantage of your invention over the [23] truck form?

A. Well, you can do that, but after you get there it may not be exactly in right. Then you would have to move your hand truck out again and make another run at it. And then it may be off another inch or so. So you would be constantly losing time trying to spot your cylinders.

Q. And using it in the form that you have is a faster way, I take it? A. Yes.

Q. I would like to go back now, Mr. Josephian, as to the reasons which caused you to make this invention. You say you commenced in the oxygen business about 1937; that is correct, is it?

A. Yes, sir.

Q. And when you first commenced in the oxygen business how did you deliver your oxygen?

A. Well, almost all the oxygen was sold in cylinders, that is, free cylinders. Everything was

(Testimony of William Josephian.)

dumped in our plant in individual cylinders, and we handled individual cylinders in the delivery of it.

Q. Cylinders like those in court?

A. One at a time.

Q. One at a time. How long a period of time did you sell oxygen in individual cylinders in that form?

A. About four years.

Q. And then what happened?

A. Well, the Linde Air Products Company——

Q. What is that name, again?

A. Linde Air Products.

Q. Linde Air Products?

A. Yes, sir, a unit of the Union Carbide Company, came out with a bulk oxygen delivery system. [24] They would manifold at the customer's place of business a number of cylinders or tubes, which would receive oxygen, then they would start out from their plant with liquid oxygen, which is at a very cold temperature. At 300 degrees below zero oxygen will run like water. It is in liquid form. They would drive their truck out to the customer's premises with liquid oxygen, that is, refrigerator cold, and then from that cold liquid they would compress it into the manifold system of the customer under high pressure, and in that way the customer wouldn't have to handle any cylinders in their yard. The yard was completely piped, and it offered quite an inducement to the type of account we were serving.

Q. Let me go over that step by step. You say

(Testimony of William Josephian.)

this other company made oxygen and delivered it in liquid form, is that right?

A. Well, they didn't deliver it. They went to the customer's premises with it in liquid form, and then they compressed it to a gas form, but they actually sold gas to the customer in gas form.

Q. It was delivered to the customer then changed into a gas form at the customer's plant, is that right?

A. Yes.

Q. And delivery took place in large trucks?

A. Yes.

Q. Something like oil trucks, or gasoline trucks?

A. Well, no.

Q. Special?

A. They didn't hold that big volume of oxygen; much smaller volume.

Q. Was it a specially-equipped truck?

A. Yes. [25]

Q. And what special equipment was there on these trucks?

A. Well, the liquid tank would have to be able to carry liquid oxygen, which is 300 degrees below zero, approximately, and it would have to be very heavily insulated or be a vacuum type of container.

Q. That would be a special truck?

A. Yes.

Q. And then it was made into a gas at the customer's plant?

A. Yes.

Q. Was that a cheap way of doing it?

A. Well, it was, yes. It was a cheap way, and not only that, it is the same as the units. He did

(Testimony of William Josephian.)

not have to handle cylinders, and a customer did not have to bother about keeping them on his manifold or anything else. All he did was use the gas.

Q. It was a new way of doing it? A. Yes.

Q. What year was that?

A. 1940 and 1941.

Q. About 1940, 1941? A. Yes.

Q. That was rather severe competition as far as you were concerned, was it not?

A. Yes, sir.

Q. What did you do to try to meet that competition?

A. Well, I can say that I got a lot of gray hair over it.

Q. Aside from the gray hairs, and in a more practical way, what did you do?

A. First I investigated the possibility of converting some of our equipment over to liquid production, which was not the practical thing to do in a small plant such as I own. Then I investigated the various other gas delivery [26] systems. Mr. Moody, in Los Angeles, had a cluster ten cylinders on a platform which he moved around with a lift truck.

Q. With a lift truck? A. Yes.

Q. That is, he got under the thing with a lift truck, lifted it up, and then moved it around on wheels? A. Yes.

Q. What was the matter with that?

A. There was nothing very wrong with it, except we had to deliver oxygen in competition and very,

(Testimony of Wiliam Josephian.)

very cheaply, and we could not afford to have a man going around trying to spot a group of ten cylinders. We had to get our deliveries in, get it out, and get it going before too much time elapsed. I didn't think that was very practical.

Q. What other means did you consider of delivering oxygen except by the individual tank method you had been using up to that time?

A. We used manifolded trucks or trailers, which I believe the Stuart Oxygen Co. at that time had a manifold trailer, or several of them, but there were others that were manifolding trailers at that time.

Q. What was the matter with that, so far as you were concerned?

A. It took a lot of equipment and it did not get down to the small user, and it did not take care of the fluctuations. Once you converted a man to both oxygen delivery and his business slowed down, you couldn't take the apparatus out. You still had a truck tied up.

Q. So what did you do about it?

A. I didn't think that was [27] so good. The Air Reduction Company had tube trailers. That was completely out of my means. So for several months I would think all the time, and I guess—I don't know—I would go to a show and wouldn't see it, go out, and wouldn't know what I was doing. Finally I hit upon the idea of balancing the cylinders on a plate, as you see here.

Q. When did you first make a model, full-sized

(Testimony of Wiliam Josephian.)

model in conformity with the invention described in the patent here in suit?

A. In about December, 1941.

Q. And over at your plant in Oakland?

A. Yes.

Q. How many cylinders were in the model?

A. Well, the first model I made was seven cylinders.

Q. Was this a full-sized model? A. Yes.

Q. And right after that——

A. Of course, seven cylinders are all right for myself. I can move that all right. But it was a little too heavy for the average man to move around. There was no trouble so far as getting the rotating motion or spotting it is concerned, but where you had to carry it a long distance or up any grade, it was just too much weight.

Q. Seven cylinders? A. Yes.

Q. So when did you make a second model?

A. Well, in the same month.

Q. About the same month? A. Yes.

Q. And the second model had how many cylinders? A. Four cylinders.

Q. In other words, the second model is similar to the device [28] we have in the courtroom?

A. Yes.

Q. And the first one with the seven cylinders is like the drawing of the patent? A. Yes.

Q. Do you remember the name of the man who assisted you in making these two full-sized models?

(Testimony of Wiliam Josephian.)

A. Well, it was a mechanic, a fellow by the name of Paul McNish.

Q. And did you try them out at that time to see if they would work?

A. Yes. We tried them out a number of times, moved them back and forth, rotated them, did everything that we could think of.

Q. I am going to show you some photographs, and I ask you if these are the photographs of the two models that you made.

A. Yes, these are the models, and I know this was the first one made, because I didn't have the half-inch bar which I have under the bottom plate on this job. It was the very first one.

Q. You mean the four cylinder one was the first one?

A. Yes.

Q. And then the seven-cylinder?

A. Yes.

Q. Are these photographs of the four-cylinder and the seven-cylinder models?

A. Yes.

Q. Do you remember when these photographs were taken?

A. They were taken sometime in December or the early part of January.

Q. Of what year?

A. 1940 or 1942.

Q. December of 1941 or January of 1942?

A. Yes.

Q. At your plant?

A. Yes. That is the back door of the plant. [29]

Mr. Boyken: I am going to offer these photographs in evidence and ask that they be marked Plaintiff's Exhibits 3-A, B, C, D and E.

(Testimony of William Josephian.)

The Court: Very well.

Mr. Boyken: I will show them to your Honor in a moment.

(The photographs were marked respectively, Plaintiff's Exhibits 3-A, B, C, D, and E, in evidence.)

Mr. Boyken: Q. Now, I understood you to say you tried them out and they worked, is that correct?

A. Yes.

Q. At approximately the date that you have given? A. Yes.

Q. Now, you spoke of this competition of liquid oxygen as being rather severe. Did you personally lose any accounts because of that cheap competition?

A. Yes. One of our largest accounts, which was the Woolridge Manufacturing Company at Sunnyvale, we lost that to liquid competition.

Q. After you made this invention and made these two models what did you do? You were commercializing your invention?

A. Well, immediately we installed our other—we had the Vulcan Steel Foundry, which was already manifold, so we asked permission if we could install the bulk oxygen system in there, and so we worked it out and they granted us permission and we started putting it into operation in February, 1942.

Q. From then on you increased your units until at the present time you have some 500?

A. Yes, sir.

(Testimony of Wiliam Josephian.)

Q. Did that enable you to meet the competition that you were [30] somewhat afraid of?

A. Yes.

Q. I mean the invention that you had made?

A. You see, in liquid delivery, after the liquid truck went out to a customer's place, he could only deliver from ten to twelve thousand cubic feet an hour, so it was up to us to find a method of being able to have the driver go out there and deliver it faster per hour. We timed how fast a driver could deliver with our set up, and we could average with a smaller setup—when I say “small” I mean six to eight units—at the rate of 30,000 feet per hour, and in the larger setups at the rate of 60,000 feet an hour, but since that time the liquid products have increased their delivery capacity to around twenty-five or thirty thousand cubic feet an hour.

Q. Then after you made these two models you had a patent application prepared and filed, is that right?

A. Yes.

Q. Your application date of the patent in suit is January 14, 1942, so I take it that was just shortly after these two models were completed?

A. Yes.

Q. And this application shows a drawing of seven of those cylinders. How did you happen to choose the model that had the seven instead of the four for illustrating your invention?

A. Well, the seven cylinders had more weight and for that reason would be more effective in demonstrating how the balance could be achieved.

(Testimony of William Josephian.)

Q. According to those photographs, the rolling ring was apparently [31] made of a separate pipe, is that right? How did you make those models, the two that are shown in the photographs.

A. Well, the rolling rings on both of them were made of pipe, but on the seven-cylinder unit I used a two-inch pipe, and on the four-cylinder unit I only used a one-inch pipe. But that is a relative matter. That is, the pipe has to be relative to the base plate to give you the proper balance, whatever balance you want in your operations.

Q. Are you acquainted with anybody connected with the defendant here, the Stuart Oxygen Company, Ltd.?

A. Well, I am more or less acquainted with all of them except their present attorneys.

Q. They are competitors of yours, I take it?

A. Yes.

Q. Do you remember attending a convention in Detroit, Michingan, about June of 1942?

A. 1943.

Q. 1943? A. Yes, sir.

Q. What kind of convention was that?

A. Well, that was a convention of the Independent Oxygen Manufacturers' Association. We were trying to get a small association started to exchange ideas.

Q. You were present at that convention?

A. Yes.

Q. In Detroit? A. Yes.

Q. Any other man in your employ there?

(Testimony of William Josephian.)

A. Mr. Kohl, my sales manager was there, and an engineer from our plant, Mr. Callow, was there.

Q. Any body from the Stuart Oxygen Company?

A. Mr. D. J. Will, [32] of the Stuart Oxygen Company was there.

Q. You say that was in June, 1943?

A. Yes.

Q. Up to that time, as far as you know, what means did the Stuart Oxygen Company have of delivering its oxygen to the job?

A. Well, they had—they used mostly free cylinders, that is, individual cylinders. They had some manifolded trucks, and I don't know whether they had any manifolded trailers, but I do know they had manifolded trucks and delivered oxygen to the customers.

Q. Was there any discussion at that convention as to your invention? A. Yes.

Q. With whom?

A. Well, with Mr. Will, and with several of the independent oxygen manufacturers.

Q. I am only interested now in discussions that you or your employees may have had with Mr. Will.

A. Well, we talked about bulk oxygen delivery, and I showed him pictures of what we had, and just how good it was.

Q. Did you show him any pictures of your invention? A. Yes.

Q. What pictures were they?

(Testimony of William Josephian.)

A. Well, they were small pictures.

Q. Do you have those pictures now?

A. Yes, I think I gave them to you.

Q. Were they pictures similar to those that are in evidence, except smaller in size?

A. No, those pictures are made by a professional photographer, but these pictures were made by Mr. Callow. [33]

Q. Was there any discussion with Mr. Will as to how the device was constructed and how it operated?

Mr. Lassagne: If your please, your Honor, I do not see the relevancy of this examination. The patent became a publication in 1943. There is no charge that Stuart used anything approximately like it prior to the issuance of the patent, and the patent can be seen by the whole world at this time. There is no relevancy at all as to the examination prior to its communication between the parties at this stage.

Mr. Boyken: There is a special defense of want of notice, and I am developing that defense. I mean I am developing our side of it. It may be anticipatory.

Mr. Lassagne: The defense of want of notice goes only to the accounting procedure, which can only follow an interlocutory decree in the case. It seems to me to be unduly extending the case. I have no objection on the ground that it is prejudicial, but it is totally irrelevant at this stage of the case.

(Testimony of William Josephian.)

The Court: I do not suppose it would be very lengthy.

Mr. Boyken: No.

The Court: I will allow it.

Mr. Boyken: Q. At any rate, at that convention you told them what your invention was and how it worked, is that right?

A. How it worked, and the fact that it was patented.

Q. You told them that it was patented?

A. Yes.

Q. Did you show them a copy of the patent then? A. No, I did not. [34]

Q. Did they say anything to you about whether or not they were using anything of the kind?

A. No.

Q. Now, did you have any further conversations with anybody connected with the defendant regarding your patent after that Detroit convention in June of 1943?

A. Well, in 1944 there was another convention in Denver, and at that time there were three men from the Stuart Oxygen Company, as well as Mr. Will and Mr. Coyne, and we covered the bulk oxygen delivery, Linde Liquid's setup, our setup, and I also at that time told them it was patented and was well covered.

Q. What was the next time they had notice of your patent?

A. I think early in 1945 Mr. Brassler wrote him a letter.

(Testimony of William Josephian.)

Q. He was your attorney at that time?

A. Yes.

Q. And that was a patent notice?

A. Yes.

Q. Were there any men from the Stuart Oxygen Company over at your plant, say, in recent years?

A. Well, yes, after we came back from Denver there were two or three Stuart Oxygen men came through our plant just to see the operation. We got it pretty clean and pretty neat, and they gave us the reason they would like to see how things were being kept up, so I invited them over.

Q. Did you show them the device of your patent in suit?

A. Yes, and I also showed it to Mr. Will, took him out to the various jobs and showed him how they were hooked up to the lines, how they were connected and all about it. [35]

Q. In what year did that occur?

A. In 1944, the latter part.

Q. When did these men come over and look at your plant? A. In 1944.

Q. When did you first hear that the Stuart Oxygen Company was making and using something similar to your invention?

A. The early part of 1945.

Q. How did that come to your attention?

A. Well, I used to have a man working for me by the name of Jack Molinari.

Q. Will you undertake to spell that?

A. M-o-l-i-n-a-r-i.

(Testimony of William Josephian.)

Q. What was he, a mechanic?

A. He was a mechanic in our shop. And he said he wanted to take a month or two off. I said, "Well, I can't afford to let you go, but all right." He went. I waited a month and asked him to come back. And he didn't show up. And after about six weeks I decided that maybe he wasn't coming back, so I hired another man. Then from time to time our truck driver, who was very friendly with Mr. Molinari, used to call on him, and our sales department would call on him to find out how he was getting along, and he was building some apparatus for Stuart Oxygen Company. And later on I heard that he was building this unit for Stuart Oxygen Company. In fact, one of our men saw the model in his shop?

Q. When was that?

A. I think that was sometime in 1945.

Q. Was that the first you heard of the Stuart Oxygen Company using something similar to what you were doing? [36]

A. They were not using anything at that time. They were just making it, and we were talking to a customer trying to get the business on bulk oxygen delivery, and the Stuart people at that time said they had something similar to ours, that they would be able to do anything we could do.

Q. When did you first see a commercial installation by the Stuart Oxygen Company of the device that is here in question? A. In 1946.

(Testimony of William Josephian.)

Q. Have you made a model of the Stuart Oxygen Company device?

A. Well, we had it ordered made.

Q. That, again, was made under your direction in your shop? A. Yes. [37]

Q. Was there also a drawing made of the defendant's device? A. Yes.

Q. Is this the drawing?

A. That is the drawing that was made.

Q. Is this the model that you made?

A. Yes.

Q. I wish you would explain to the Court by referring to the model and perhaps also to the drawing just how that Stuart Oxygen Company's device operates.

The Court: I believe there was a model——

Mr. Boyken: I was going to put them both in evidence at the same time, but I can do that. We offer in evidence the model of the plaintiff's device and ask that it be marked Plaintiff's Exhibit 4, and the model of the Defendant's device as Plaintiff's Exhibit 5.

Mr. Lassagne: I have no objection to Plaintiff's Exhibit 4. I do object to Plaintiff's Exhibit 5 because it has not been established by proper testimony that it corresponds dimensionally or according to scale with anything that the defendant has manufactured.

Mr. Boyken: Your Honor, I don't contend it is the defendant's device. It is a representative model only. I hope to put in either the defendant's de-

(Testimony of William Josephian.)

vice or a photograph, so there will be no question about that.

The Court: Plaintiff's Exhibit 5 is offered for illustration? [38]

Mr. Boyken: Well, both of them are for that purpose. I am going to ask in a moment what the scale is.

The Court: You may proceed.

(The models of Plaintiff's device and of Defendant's device were marked, respectively, Plaintiff's Exhibits 4 and 5 in evidence.)

Mr. Boyken: Q. How were these models made, Plaintiff's Exhibits 4 and 5, what scale was used?

A. We used 2 inches to 1 foot.

Q. I take it you made them just as well as you could for illustrative purposes?

A. Yes; we tried to balance the cylinders as far as weight is concerned comparable to the weight of an oxygen cylinder, and physical dimensions and weight of an oxygen cylinder and everything about it. We tried to do a workmanlike job to make a true model.

Q. Now, in what respects, if any, do these devices differ?

A. Well, the way they are—the cylinders are held together, which is very obvious.

Q. That is, in your device you have what means of holding the cylinders together? I am referring to Plaintiff's Exhibit 4 as your device?

A. Well, in my device, the cylinders are held together with the top and bottom plate being bound

(Testimony of William Josephian.)

by bolts which go from the bottom plate to the top plate and they are tied down or held still in place. In the defendant's device they hold it from the side; in other words, this strap [39] to a center member.

Q. You have a full plate at the top?

A. Yes.

Q. The defendant has a plate? A. Yes.

Q. They have both bases? A. Yes.

Q. Have they both tracks at the bottom of the base? A. Yes.

Q. In your case the track is attached to the base in what way?

A. Well, it is welded on, it is a part of it.

Q. In the defendant device what, if any, difference is there?

A. It is dropped out of one piece of metal, but it has the same effect as being welded.

Q. The defendant may be operated in the same way? A. Yes.

Q. There was a slight difference in the balance of these? A. Yes.

Q. What difference is that?

A. Well, apparently they have not allowed quite as much clearance on the bottom of their unit compared to ours so you can pull it over like this and it will come back.

Q. The tendency is to straighten itself?

A. Yes.

Q. Does that make any difference in the maneuverability of these two units? A. No.

Q. They move just the same? A. Yes.

(Testimony of William Josephian.)

Q. On the track? A. Yes.

Q. As far as the tipping over or the upsetting, would that make any difference?

A. No. It has also a second stable position where it won't fall over unless you exert a great deal [40] of pressure.

Q. I take it that Figure 3 is the figure corresponding to Figure 3 of your patent. Your device will not remain over unless it is held in that position? A. That's right.

Mr. Lassagne: I suggest the drawing be marked for illustration at this time so we will know what we are talking about.

Mr. Boyken: I intended to put that in evidence. It may be better if I do it now. I offer the drawing referred to by opposing counsel in evidence and ask it be marked Plaintiff's Exhibit 6.

Mr. Lassagne: I object to the drawing on the ground there is no evidence that it corresponds dimensionally or otherwise with anything the defendant manufactures.

The Court: Ask him where he made it, or how he made it.

Mr. Boyken: Q. How did that drawing happen to be made?

A. I think we took physical dimensions of a Stuart Oxygen Company tank.

Q. Where did you see the unit of the Stuart Oxygen Company?

A. At a customer's plant.

Q. Was this drawing made as a result of that?

(Testimony of William Josephian.)

A. Yes.

Q. You did not make the drawing yourself?

A. No.

Mr. Boyken: I will offer it in evidence as Plaintiff's Exhibit 6.

Mr. Lassagne: I object to that. The witness did not take the measurements himself. He thinks they were taken. He [41] did not make the drawing himself. He has no firsthand knowledge of the authenticity of that drawing or if it corresponds with defendant's device.

Mr. Boyken: I expect to put the defendant's device in evidence, or a photograph of it, so there is no question about that.

Mr. Lassagne: The fact is it does not correspond and we will show that in our case. I think it is important. I object to a drawing of the defendant's device like that.

The Court: Wouldn't it go to the weight of the evidence of the witness? He says it is a correct drawing of the defendant's device. If it is not that can be brought out. I don't know whether that would go to the question of its admissibility at this time. Then the question would later arise as to how much weight the Court should give that in evidence.

Mr. Lassagne: Very well. If it is done only to illustrate his testimony——

The Court: The witness said the drawing was made under his direction, that it was a correct draw-

(Testimony of William Josephian.)

ing. That would make it admissible. You then, of course, could develop whether it is correct.

Mr. Lassagne: I wanted to avoid the impression that there was any testimony connecting it directly with the defendant's device except by hearsay.

The Court: What we have said is in the record and I [42] think that will take care of that matter. Let it be marked.

(The drawing of defendant's device was marked Plaintiff's Exhibit No. 6.)

Mr. Boyken: That brings up the point that we want to have clearly in evidence in this case what we consider as an infringement and it is impracticable to put in evidence those four tanks of yours and the base and so on, but it is on exhibit here and I would like to put that in evidence with permission to withdraw it and substitute a photograph.

The Court: All right.

Mr. Lassagne: We will give you two options. You may put in evidence the device with the four tanks on it, which is a rather bulky and heavy thing to handle, or you can put in evidence the holder itself without any tanks in it, which is more easily handled.

Mr. Boyken: As long as we have a setup here with the four tanks and the so-called holder of tanks, I think I would like to put in evidence the four tanks and the holder of the defendant and have it considered in evidence and with permission to withdraw it and substitute a photograph because

(Testimony of Wiliam Josephian.)

it is impracticable to have a big thing like that in evidence.

The Court: Does that belong to the defendant?

Mr. Boyken: That one does. I want to do the same thing with this.

The Court: What? [43]

Mr. Boyken: I want to do the same thing with the plaintiff's.

The Court: There is no question but what that is the defendant?

Mr. Lassagne: We will stipulate the green device here in court is the defendant's, the device manufactured and used by the defendant.

The Court: You could substitute a photograph later on.

Mr. Boyken: I offer the defendant's device, which is the accused device, and ask that it be marked Plaintiff's Exhibit 7, and I also offer in evidence the device made in accordance with the patent by the plaintiff and ask that that be marked Plaintiff's Exhibit No. 8.

The Court: Very well.

(The defendant's and the plaintiff's devices were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits 7 and 8.)

Mr. Boyken: Then if we choose I presume we can substitute photographs.

The Court: Yes. I don't know what I will do with these things later on. You'd better substitute photographs.

(Testimony of Wiliam Josephian.)

Mr. Boyken: I think that will be the best, perhaps to substitute photographs for these. I have no further questions. You may cross-examine.

Cross Examination

Mr. Lassagne: Q. When you applied for your patent in suit, [44] Mr. Josephian, were you of the opinion that you were the first one to invent a portable gas cylinder holder in which a plurality of cylinders were connected together so they may be filled, delivered and emptied as one cylinder?

A. No, because I already knew that others were manufacturing cylinders and they were portable. They got under them with a hand truck to move them around.

Q. You were not of the opinion then that you were the first one to invent a gas cylinder holder making it possible for one man to move several cylinder tanks?

A. No. In fact, I didn't give it a thought as being a first or any other way.

Q. Your patent states a number of objects of your invention and as I read this particular passage I would like you to consider it with the purpose of telling me whether or not you regard yourself as the first to accomplish these objects. Beginning at Page 1, Column 1, Line 5, you say:

"Among the objects of my invention are: to provide a simple and efficient truck for handling a plurality of cylinders; to provide a means for easily handling a plurality of heavy cylinders containing

(Testimony of William Josephian.)

a usable gas; to provide a means for assembling a plurality of cylinders into an easily movable unit, and to provide a simple and efficient truck for handling gas cylinders, such as oxygen, hydrogen, acetylene, carbon dioxide tanks, or the like". Did you consider that you were the first to accomplish [45] any or all of those objects?

A. About providing an easy and efficient means, yes, I feel that I was the first to accomplish that effect, but as far as accomplishing portability is concerned, no. As I said before, there were others that had manifolded cylinders.

Q. You mean yours was comparatively more easy and comparatively more efficient than previous things——

A. Yes.

Q. You testified it had been customary for a long time prior to your invention to move individual cylinders by tipping them up and rolling them on an edge, is that right?

A. Yes.

Q. That lower edge of an individual cylinder is rounded and has a bottom conformation very much like the circle of your Track 11 in your patent?

A. It has, but it is at the edge so that if you tip it over to a certain point, it will fall clear over, it has no second stable position there.

Q. That is because there is nothing attached to it there in your cylinder corresponding to the bottom plate——

A. No, that has nothing to do with it. It is a matter of relation of the inner track and the outer track.

(Testimony of Wiliam Josephian.)

Q. Isn't it the contact of the edge of the plate with the floor that keeps it from tipping clear over? A. Yes.

Q. When you move a single cylinder by tipping it and rolling it on the lower edge of the track it is slightly balanced on the edge on which you roll it as near as possible to make it [46] easy to roll?

A. Yes, but you never really balance it equally, you always have a little pressure. It is almost physically impossible to get it exactly in balance.

Q. Well, that is a mathematical point which you never see or achieve, but you can get close to it by the push outward or pull inward where it is at a minimum? A. Yes.

Q. You can get either one in a position which would be the balancing position? A. Yes.

Q. With a device of your patent it is even more important to get as close to that balance point in rolling it on the Track 11, isn't it, because of the great weight involved? A. Yes.

Q. Your device is so constructed that you can move over to both sides of its point of balance on Track 11, is it not?

A. Yes, but it doesn't have to be that way. It is merely—that is one way of doing it.

Q. I am talking about what you disclosed in your patent, not what you thought of since. Is there any other way disclosed in your patent?

Mr. Boyken: I object to that. The patent speaks for itself. It is a broad, generic patent, and the description is there.

(Testimony of Wiliam Josephian.)

Mr. Lassagne: Will you stipulate it is not disclosed in the patent?

Mr. Boyken: I say the patent only covers your device.

The Court: I will allow the question. Would you like to [47] have the question read?

The Witness: Yes.

(Question read.)

Mr. Lassagne: Is there any other way disclosed in your patent?

A. Well, I think the patent states in the literature that it can be done many ways and you can get any desirable balance you want. It doesn't say it has to be over the center of gravity.

The Court: We will take a recess until two o'clock in this matter.

(A recess was thereupon taken until 2:00 o'clock p.m.)

Afternoon Session, April 30, 1946, 2:00 p.m.

WILLIAM JOSEPHIAN,
recalled.

Cross Examination (resumed)

Mr. Lassagne: Q. Mr. Josephian, just before the noon recess we were discussing the matter of bringing the unit to a balanced position for rolling so that the tendency of the unit to pull away from you or to push toward you during the rolling operation would be minimized, and I understood you

(Testimony of Wiliam Josephian.)

to say that according to the disclosure of your patent it was not stated to be necessary that the unit be so constructed as to be capable of being moved to that balanced position, is that correct?

A. Well, I thought the patent said that it could be placed in any kind of a balanced position. That depends on the person building the unit, and how they wanted to operate. Now, if you wanted to get exactly in a balanced position you could make your tracks relative to one another so that they would be exactly balanced, or if you wanted to go back, you could make your track a little bit larger and it will go back, or if you wanted to go outside the inner ring, you can reduce the diameter and it will go the other way. But in all of it, it allows protection to the operator in that it does not overturn. That is the principal thing we are trying to do.

Q. Mr. Josephian, here is a printed copy of your patent involved in this suit. Can you find me any place in the printed specification [49] of that patent where it says that the unit need not be so constructed as to be capable of being moved to a balanced position, that is, the position in which it has a minimum tendency either to pull toward you or tip away from you?

A. What is it you want to know? In line 45.

Q. What page and column?

A. Page 2. That is in paragraph 45. It says, "I wish it to be distinctly understood that the drawing given herewith is illustrative only, and that the relative diameters of track 11 and lower plate 8

• (Testimony of William Josephian.)

may be varied as desired to control the amount of force necessary."

Q. Necessary for what? Read the rest of the sentence.

A. "to tilt the unit into the tilted stable position where the center of gravity thereof is between contacts 17 and 20."

Q. Doesn't that mean beyond balanced position outwardly?

A. Yes, but then I also mention that it is not the only way to do it, that that is an example, that is an advantageous way of doing it, especially our original model of seven cylinders, but when the units become smaller and we have less weight to handle it is not so important to have the balance line right on the center track.

Now, a single oxygen unit has only one balanced position. It is either on the very line or it falls over completely. You know that and I know that. Yet, it is no harm to anybody. Anybody can roll an oxygen cylinder around and have no trouble because it is not very important. [50] Only when you get into extremely heavy weight does it become important. With four-cylinder units it is not so important either. It is nearly balanced. It does not say that it has to be on the line. But what we are trying to do with the unit and with this system is to be able to maneuver it into position to make hookups. That is all we are trying to achieve, and so it does not upset.

Q. Now, I have this 4-cylinder unit of yours,

(Testimony of William Josephian.)

which is plaintiff's exhibit 8, in what corresponds to the tilted stable position illustrated in Fig. 3 of your patent drawing. Now, isn't that the tilted stable position referred to in the last part of the paragraph you just read?

A. It is, I guess. I would take it so.

Q. Then the variation of the relative diameters of track 11 and lower plate 8 is for the purpose of controlling the amount of force necessary to move it to this position, is that correct?

A. Would you state that again?

Mr. Lassagne: Will you read the question, Mr. Reporter?

(Question read.)

A. Well, not necessarily. There is no object in leaving it in a tilted position. We do not sell gas that way. It is merely the amount of force necessary to move it.

Q. I am asking you what the patent says with respect to the variation of the amount of force. It says, "the relative diameters of track 11 and lower plate 8 may be varied as [51] desired to control the amount of force necessary to tilt the unit into the tilted stable position." That is the position in which I now have that unit. Now, I am asking you to find for me any place in that patent where it says that the purpose of varying the relative diameters of the track and the lower plate is to control the amount of force necessary to move it less than that distance to a position where it is unstable?

(Testimony of Wiliam Josephian.)

A. Well, the patent in three or four places mentions the fact that the only reason why the inner track is built is to be able to move the unit in a given direction, and the only reason why the outer plate is built relative to the inner plate is so that it does not overturn. Now, that is the original claims. I didn't write the words in his patent, really. I just do not know what you are trying to achieve. I can't say yes, no, I can't find it, or yes, I can find it.

Q. Well, you read it before you signed your name to it and presumably were satisfied that it described your invention, weren't you?

A. Well, I thought the other fellows were able to handle words much better than I do. I know about them and took it for granted.

Q. Incidentally, what do you regard as a stable position as the word is used in that patent?

A. I regard stable position with regard to the patent as a place where the unit stops and a greater force has to be applied in order to bring it on over before it falls down. [52]

Q. Don't you understand the term "stable" as describing a position in which it will stay if you take your hands off of it?

A. Not necessarily.

Q. Have you had any formal education in physics, Mr. Josephian?

A. Physics?

Q. Yes.

A. High school education in physics.

(Testimony of Wiliam Josephian.)

Q. When you were inventing this device did you have to figure out what diameter to make the ring 11 so that you could tip your device to a balanced position before the edge of the plate struck the floor?

A. Well, that was really too much work, so I ordered from a pipe bending firm a half dozen rings and made them up and picked out what I thought was the best of different diameters, and we just made them up, assembled them, and saw how they worked, and so far as getting right down and figuring scientifically with all the weight involved, any everything else, no, I can't say that I figured it. You must remember that I am not an engineer by profession.

Q. It is quite all right to do it by trial and error, but all I wanted to know was how you made your selections from the various rings you obtained in that way.

A. Well, then you can say I made it by experience or by practice.

Q. Were any of the rings that you obtained in that way of larger diameter than the one you eventually used? A. Yes.

Q. And when you used a ring of larger diameter than the one that you used did the unit stay in tilted position when you took [53] your hands off of it, or did it go back to a vertical position?

A. Well, if I used a larger diameter ring—now, for instance, if this unit was a little flatter, closer to the floor, it also, even though the diameter is the same thing, I found it would go back, and I

(Testimony of Wiliam Josephian.)

found that in order to be able to use a standard thing like a one-inch pipe, I had to put clips on the bottom. You notice on the bottom a half-inch clip. Otherwise it would come clear over. So we just picked on the best application for our particular business and used it.

Q. You selected the one that would stand in tilted position with your hands off of it?

A. Not necessarily. The idea of the tilted position is merely to show that it does not fall over, that in handling it, if you get it over too far, it does not go out of control. I am very sorry that the darned things stands over there, because it is confusing the issue. Everybody thinks that is the way it has got to stand. We can't use it in that position, we don't sell gas that way, we don't handle it that way, and we don't do anything that way. It is merely the part of it that happens to work out that way.

Q. The fact that it can move that far in the case of the seven-cylinder units, which are very heavy, makes it possible to get the unit tilted to the position where the center of gravity is right over the rolling edge, doesn't it? A. Yes.

Q. That makes it easy to move those very heavy units?

A. Yes. But it could have a much larger diameter and you could still [54] get it over the center of any ring. It doesn't mean that it has to be of a certain size.

Q. No, but it is a matter of the relation of the

(Testimony of William Josephian.)

diameter of the ring to the diameter of the base plate? A. Yes.

Q. Or the thickness of the ring to the diameter of the base plate that controls whether it will stay there or go back? A. Yes.

Q. Does your patent specification tell anywhere how the dimensions of the ring, that is, its diameter and/or its thickness should be related to the diameter of the bottom plate to permit the unit to be tipped far enough to balance on the ring for rolling?

A. Yes, I think it states in it, and shows that as an example or an advantageous way of doing it.

Q. Does it tell what the ratio of the diameter of the ring ought to be to the diameter of the plate, not in absolute dimensions, but in proportion terms?

A. Yes, I think it mentions, assuming the seven-unit job, I think it mentions that the weight should come between the inside and the outside circle.

Q. That is the result to be secured, and not the way to secure that result. I want to know where the patent teaches you how to relate the dimensions of the ring to the dimensions of the plate so that the center of gravity will come to that position.

A. I don't know. I can't answer you, sir.

Q. Now, again, your patent specification emphasizes the desirability of designing your device so that the force required [55] to tip it completely over will be greater than the force required to tilt it initially out of vertical position to rolling position, is that correct?

(Testimony of Wiliam Josephian.)

A. I think the patent says that but actually we do not do that. It is less to tip it clear over than it is to tip it in the first place.

Q. That is true of the four-cylinder unit, Plaintiff's Exhibit 8, isn't it? A. Yes.

Q. After it is in tilted position like this, a smaller pull will tip it completely over than would tilt it originally to the tilted position?

A. Yes, but I feel all it has to do is stop there so it does not fall over, or it does not overturn. So far as the force necessary to bring it completely over, I do not see the point in it, because it does not sell gas.

Q. With reference to this drawing entitled "Defendant's Tank Truck," marked Plaintiff's Exhibit 6, do you know what scale that drawing is drawn to with respect to the defendant's actual unit?

A. I understand it was taken from this drawing.

Q. Referring to your patent drawing?

A. Yes, and sort of made illustrative of whatever is here; that is the size of the cylinders showing the base plate. I do not think those are the dimensions at all.

Q. What did you tell the draftsman to do?

A. Well, Mr. Boyken asked me if it would be a good idea to get a drawing made of the defendant's invention, and I thought it was, and that is all there was to it, and they went and did it. I [56] don't know exactly—I don't remember telling the draftsman what to do.

(Testimony of William Josephian.)

Q. Did you tell him to make it accurately showing the construction of the defendant's unit?

A. I don't remember. I don't remember telling the draftsman anything about it. Mr. Boyken handled that.

Q. Didn't you check the drawing after it was made to determine whether it actually delineates the defendant's unit or not?

A. Well, I checked it in that it looks similar to their unit, but as far as getting the ruler and measuring it for dimensions and everything else, no.

Mr. Boyken: If you have a better drawing of this device you may use that, but, after all, this is merely a drawing of your device and we had to do it under difficulties. If you want to produce a drawing we will substitute it for this one.

Mr. Lassagne: Mr. Boyken, you have had access to our devices from time to time for the purpose of examining them and taking measurements, which was done in my presence. I propose to check this drawing here and now to show that it is not only carelessly made but is off in respects which makes the delineation of the defendant's device appear much more similar to the plaintiff's than it is.

Q. Mr. Josephian, since you have testified that this drawing was made under your supervision and your direction, I wish you would step down and first measure the diameter of the bottom [57] plate shown in Figure 4 of the drawing, Plaintiff's Exhibit 6, and then measure the bottom place of the defendant's unit, which I have here, so that we

(Testimony of William Josephian.)

may determine the scale on which that drawing is made?

A. Didn't I mention that these models were made under my direction? Did I also include drawings made under my direction?

Q. I so understood you?

A. I don't remember where the drawings were made under my direction. I believed it was the models we were referring to at the time. That is what I understood. However, I will measure it off for you, if you want me to.

Q. Well, if you now say the drawing was not made under your direction there is no necessity to have you do that. We can have our own man do it when he comes to testify. But the drawing was admitted in evidence on that understanding. I believe.

A. What I was going to say, the conversation before was, you wanted to know how these units were built and we talked about these particular units here that were——

Q. The models in evidence?

A. The models. They were built according to the scale to the best of our ability. I am quite sure about that, sir. I don't think we were talking about drawings at all. The word "drawing" may have gotten into it from the fact that we had to make a sketch of the model before we got the actual size in the physical fabrication.

The Court: We have the actual device in court and it can [58] be observed by the Court; it is

(Testimony of Wiliam Josephian.)

going to be withdrawn, as I understood, and photographed. Is it of any great moment whether this drawing is not precisely to scale or not?

Mr. Lassagne: It becomes so, your Honor, because in devices of this character relatively small changes in dimension of certain critical parts alter the entire mode of operation of the device as a whole. The importance of it was brought out in some of Mr. Josephian's testimony just a moment ago. If he used a ring on his device which was of less thickness, the device would not stand in a tilted position with your hands off, but would go back to a vertical position. And I will show through our own witnesses when the time comes, since Mr. Josephian denies responsibility for this drawing, that the corresponding vertical dimension of the draw in the lower plate is very much exaggerated in this drawing entitled "Defendant's Tank Truck". Josephian testified that the diameter of the ring member of his patent or the relation of that diameter to the diameter of the bottom plate made a difference whether it stayed in the tilted position with the hands off or not. And I will also show that in this drawing entitled, "Defendant's Tank Truck," the diameter of what they say corresponds to their ring in its relation to the total diameter of the plate is very much exaggerated with respect to the defendant structure. So what they have shown in the drawing probably would function as the plaintiff device does. [59]

The Court: I did not take it that that was in-

(Testimony of William Josephian.)

tended to show that the precise dimensions were claimed as the basis for infringement.

Mr. Lassagne: No, your Honor is quite correct.

The Court: I take it from what the witness says what his invention was, was, first, to have the mobility accomplished by this ring around the bottom and, secondly, an added safety feature so that there would be a point in the movement where the thing would not fall down immediately, and his claim is substantially that is the same thing your client is using, irrespective of the precise dimensions involved. That is what I have gotten from the examination so far.

Mr. Lassagne: Your Honor is correctly characterizing that as this witness' appraisal of his own invention.

The Court: I think perhaps it would serve your own purpose better, although I do not know as much about this case as you do—very little about it, so far—perhaps you can better develop that through your own witnesses because Mr. Josephian says he did not draw this.

Mr. Lassagne: Yes, he now says it was not drawn under his supervision and therefore I propose not to ask him to do this measuring job at this time. Viewing his own characterization of his own invention as what he invented, his position may be satisfactory.

The Court: That may be a matter for argument. [60]

Mr. Lassagne: We haven't yet gone into the

(Testimony of Wiliam Josephian.)

patent documents, but what I wanted to forestall was producing in the Court's mind the idea that this was accurate delineation of what the defendant was manufacturing and using.

Mr. Boyken: I want to be fair. That is not exactly a scale drawing. It is merely to illustrate what the defendant is doing. We have the actual device in court and, of course, that is what we intend to show was used. But that is so big we wanted something to show how it looked and how it was constructed.

The Court: To show the general construction without its being an accurate precise representation in actual dimensions.

Mr. Boyken: No, I do not pretend it is an actual scale drawing.

The Court: That would take care of what you have in mind?

Mr. Lassagne: That is all from this witness, then.

Mr. Boyken: I have no further questions.

I want to offer in evidence, your Honor, a certified copy of the file wrapper and contents of the patent in suit and ask that it be received as Plaintiff's Exhibit 9.

The Court: Is there any objection, Mr. Lassagne, to the file wrapper? I know that attorneys always offer these in patent cases. I have never gotten around yet to reading one of them. Unless there is some particular matter that counsel calls my attention to, I have never really, in all honesty,

[61] ever read one of the things from cover to cover, so if you have anything especially you want to point out in it, I think it would be well to do that at some stage of the proceedings.

(The file wrapper and contents were thereupon received in evidence and marked Plaintiff's Exhibit 9.)

Mr. Boyken: I want to read very briefly from this now.

The Court: Either now or at your convenience.

Mr. Boyken: It is so brief I would like to take it up now. As your Honor knows, this is a certified copy of what is in the patent. During the time that the application was filed, that is, from its filing date, January 14, 1942, until the date of the issuance of the patent, April 20, 1943, this shows what transpired during that period. And the first portion is the application exactly as it appears here in the patent. And then we have the claims at the end, just exactly as they are in the issued patent, except instead of the seven claims of the issued patent, when the application was first filed it had eight claims in it. So after the application was received with the petition, oath, description and drawing, the Patent Office acted on it. This is the first action of the Patent Office and the only action of the Patent Office.

Now, it was filed, as I say, on January 14, 1942, and on August 11, 1944, this is what the Patent Office said. There [62] are just three paragraphs here:

“In the drawings Figure 2 a full circle should be

shown in the center of Plate 6 to show the top of this central Tank 1. Plate 8 is rejected as indefinite and failing to point out and distinctly claim the invention as required by Section 4888 Revised Statutes.

“Claims 1 to 7 inclusive are allowable as the examiner is now advised.”

That is the end of the quote. That is all the Patent Office said. There was no citation of the prior art, lack of invention, or anything of that kind.

Then under date of January 26, 1943, a few months after the Patent Office action, the attorney who was prosecuting this action wrote to the Patent Office in reference to that Patent Office action and the response is as follows:

“Honorable Commissioner of Patents
Richmond, Virginia.

“Sir:

In response to office action of August 11, 1942, kindly enter the following amendment:

“Claim 8: Cancel without prejudice.

“Remarks: Cancellation of Claim 8 places this application in condition to be passed to issue of the allowed Claims 1 to 7 inclusive.”

In a separate letter applicant is authorized to change [63] in his drawings as required by the examiner. And then the attorney also writes to the Patent Office asking that the drawings be changed. I may say that that change is an immaterial change, and I am sure Counsel will agree with me in that there should be a full line of a certain tank shown

instead of this dotted line. That is all that happened. The drawing was changed, by the way, in that minor particular. Then on March 1, 1943, there is an allowance from the Patent Office and it says, "The application for a patent for an improvement in tank truck filed January 14, 1942, has been examined and allowed with eight claims," and then there is a lot of other reading matter, and the final fee of \$30 was paid and the patent thereupon issued. That is all there is in this file wrapper. [64]

The defendant offers in evidence at this time a series of three photographs referred to in Defendant's Request for Admission No. 2, which said, "A holder of a plurality of gas [72] cylinders manifolded together as shown in the photograph attached hereto as Exhibit B-1". I will have to offer them as Defendant's Exhibit A.

The Court: A?

Mr. Lassagne: "And a truck for handling said holder as shown in the photographs attached hereto as Exhibit B-2 and B-3". You will have to mark that A-1 and these next two will be A-2 and A-3.

(The photographs referred to in Defendant's Request for Admission No. 2, as Exhibits B-1, B-2 and B-3, were thereupon received in evidence and marked Defendant's Exhibits A-1, A-2 and A-3, respectively.)

Mr. Lassagne: Three photographs. We have referred to them as B-1—these were publicly used according to the request for admission in Los Angeles and vicinity by the Home Oxygen Company, commencing in January, January 1, 1941, for more

than one year prior to the filing of the application for the patent in suit.

The Court: I thought you had referred to them as exhibits—they were “B”, weren’t they?

Mr. Lassagne: They were “B” in the Request for Admission. I was offering them as “A” here because we haven’t yet offered an Exhibit A.

The Court: All right.

Mr. Lassagne: The next is a series of four photographs, [73] which are referred to in the defendant’s Request for Admission No. 3, I think we will again have to step the letter up one place in the alphabet and offer them as B-1 to B-4 inclusive.

The Court: B-1, B-2, B-3 and B-4—B-1 to B-4 inclusive.

(The four photographs referred to in Defendant’s Request for Admission No. 3 were thereupon received in evidence and marked Defendant’s Exhibits B-1, B-2, B-3 and B-4 respectively.) [74]

H. P. McKOON

called as a witness on behalf of defendant; sworn.

The Clerk: Please state your name to the court.
A. H. P. McKoon.

Direct Examination

Mr. Lassagne: Q. What was the manner in which it was used?

(Testimony of H. P. McKoon.)

A. That held approximately 150 cylinders that were tied together in groups of 4 by means of a spider manifold very similar to the one we are using on our present device, and the headers were run down the length of the truck, four headers were run down the length of the truck manifolding this group of 4 into the main header, and that was charged at our plant as a unit, towed off to the customer's plant and left there, hooked up by flexible cable to his point of use, and there were shut-off valves on each one of the four main headers into the lateral header at the end, and the customer could use that, the four at once, or generally he would use one at a time, one of the main headers at a time, one of the four main headers at a time, and then after it was empty it was disconnected and brought back to our plant.

We had some trucks hooked up in exactly the same way that we took out, and we brought those back.

Mr. Lassagne: I offer these in evidence as Defendant's Exhibits C-1 to C-4, inclusive.

The Court: They may be admitted and marked.

(Defendant's Exhibits C-1 to C-4 for Identification were thereupon received in evidence.)

Mr. Lassagne: Q. I show you the photographs which are in evidence as Defendant's Exhibits A-1 to A-3, and ask you if you ever observed units of that character in use.

A. Yes. [79] Those were the units that the Home Oxygen Company, in Los Angeles, used, and we

(Testimony of H. P. McKoon.)

at one time proposed to use. In fact, these particular photographs had the Stuart Oxygen printed on the cylinders, rather than Home Oxygen. We had these photographs made for advertising purposes but never actually put the units into service, although Home Oxygen did for years.

Q. With reference to those units, were the cylinders manifolded together so that they were filled, delivered, used and re-used as a unit?

A. Yes.

Q. How were those units moved from place to place?

A. You mean the——

Q. The Home Oxygen Company.

A. They had an ordinary warehouse type of lift truck. It is illustrated on the pictures.

Q. With reference to the device which is in evidence as Plaintiff's Exhibit 7, which is the present Stuart unit, and which is charged by the plaintiff to infringe the patent in suit, will you describe to us the manner in which those are used in your commercial practices, demonstrating, if you desire, with the unit which we have here in court?

A. Those are filled as a unit of four. In fact, we have the hand wheels taken off the valves, all except the main valve, hooked up to the manifold in our plant and filled and taken to and from the manifold by means of the hand truck, like, well, the one you have there—we have several of them of the same type. We have a stop on the floor—shall I get down and [80] illustrate?

Q. Yes, demonstrate.

A. We have a stop on the floor, which is a strip

(Testimony of H. P. McKoon.)

of steel about an inch wide and a quarter of an inch thick. That is put in the proper position in front of the manifold so that when we come up to the manifold, the tires hit that like it is hitting this now. It is in position. Then it is dumped forward and the truck can be taken back. They always come in the right position, so far as this is concerned, because of that stop. It may have to be moved and inch or so one way or the other to line it up with the pigtail, and then after they are stopped, this valve shut off, they are taken away with this same hand truck and they are put in storage or on motor trucks for delivery to customers.

At the customer's plant it is handled the same way. The agent's hand truck enters underneath the lip and this receives the cylinder, so that it can't come off; and then it is taken back in this position. The weight is carried by the third wheel and it can be handled in that way.

Q. So the record will be clear, will you describe what you were referring to when you said, "this receives the cylinder so it will not fall off"?

A. This point of metal here and this slot in here which catches the little bit of this that projects, so it is caught at two points, top and bottom.

Q. Is that, then, a truck specially constructed for moving this type of unit as distinguished from a general purpose truck? [81]

A. Oh, yes, this truck is especially constructed. It is ordinarily used as a two-wheel truck, but when they are pretty heavy you can make a three-wheel

(Testimony of H. P. McKoon.)

truck out of it. This would be in the way handling anything else, and that slot would be in the way handling anything else.

Q. The feature that would be in the way in handling anything else is the triangular metal going between the cylinders when you place the units on the truck? A. Yes.

Q. Is it your practice under any circumstances to move those units except in adjusting them as you illustrated in your testimony by rolling them on the depression in the center of the plate?

A. No, we have one of these trucks on our filling platform at the plant and we have three or four others that are either carried on the trucks or left at the customer's place of business in some cases. We never have them in any other way except on these trucks.

Q. Has that been true ever since you commenced the use of these cylinders?

A. Well, the first truck we had was similar to this ordinary warehouse truck here. We always handled them on a truck, although we did not get this truck until we had the first few units a week or so and worked this thing out especially for the job.

Mr. Lassagne: I would like at this time to offer the special hand truck concerning which the witness has been testifying in evidence as Defendant's Exhibit D, subject [82] to the same stipulation that it may be withdrawn and photographed with the unit of cylinders if desired.

(Testimony of H. P. McKoon.)

Mr. Boyken: Yes, that is agreeable, your Honor.

(The hand truck in question was received in evidence and marked Defendant's Exhibit D.)

Mr. Lassagne: Q. Now, in commercial use of your devices, do you know of any cases in which the customer has occasion to move these devices from place to place?

A. No, we do not encourage customers to move them. They are pretty heavy.

Q. How are they used in the customer's premises?

A. They are ordinarily hooked right up to the manifold at the customer's place of business, that is, they are manifolded back in a central line just the way new cylinders are handled in bigger place, and all the customer does is open and close some valves.

Q. What I understand you to refer to when you say the manifold at the customer's place of business is something like the gaspipe in a residence in a country hookup of butane gas?

A. No, the customer ordinarily has a platform the same height as the truck, and on the back edge generally of that platform is a pipe with outlets spaced about the same distance apart as that thing is wide, or giving a few inches leeway, and these are lined up by means of one of those stops I have described in front of that pipe manifold and attached by flexible connections.

Q. Where does the manifold go?

A. Then there is a pipe-line [83] off that mani-

(Testimony of H. P. McKoon.)

fold that goes through the customer's shop. At some places there are one or two places and sometimes he has an elaborate piping system throughout his shop.

Q. He takes off with welding instruments from that pipe-line?

A. Cutting equipment at different points.

Q. Are you acquainted with a person named Molinari, to whom Mr. Josephian referred in his testimony?

A. Yes, I am.

Q. Was Mr. Molinari employed by you to construct units of the kind exemplified by Plaintiff's Exhibit 7?

A. Mr. Molinari constructed those units in his shop for us, not as an employee, but as a contractor.

Q. Had Mr. Molinari ever been an employee of yours?

A. Mr. Molinari was an employee of ours. He was definitely on the payroll from November, 1934, through August, 1936. Prior to 1934 he had worked for us either as a contractor or an employee—I am not sure which. I couldn't find the old payroll records. And then between—some time after August, 1936, he worked for Mr. Josephian for, I believe, a couple of years. And recently he has reopened—well, he always did have a little shop across town which he ran more or less part time, and which he recently reopened, and he has been making several different items for us in that shop, including these units.

(Testimony of H. P. McKoon.)

Q. To the best of your information, then, he was an employee of yours long before he was an employee of Mr. Josephian? [84]

A. He was an employee of ours before Mr. Josephian was in the oxygen business.

Q. I hand you a blueprint which I will first ask to be marked for identification as Defendant's Exhibit E and ask you what it illustrates, if you know?

(The blueprint was marked Defendant's Exhibit E for Identification.)

A. It illustrates the Stuart Oxygen Company's present unit as shown here.

Q. The dimensions shown on that blueprint correspond in every particular to the units which you have manufactured and used, and which are exemplified by Plaintiff's Exhibit 7? A. They do.

The Court: According to scale, you mean?

Mr. Lassagne: To scale drawing.

The Witness: Yes. It is off scale in one or two places, but it is indicated where it is off scale by the broken lines. It is a construction drawing.

Mr. Lassagne: Q. The dimensions are shown numerically as well as the drawing, itself, being to scale? A. Yes.

Mr. Lassagne: I will offer that in evidence, then, as Defendant's Exhibit E.

The Court: Very well.

(Defendant's Exhibit E for Identification was thereupon received in evidence.) [86]

Mr. Lassagne: That is all. You may cross-examine if you wish.

(Testimony of H. P. McKoon.)

Cross-Examination

Mr. Boyken: Q. Mr. McKoon, I understand that the Stuart Oxygen Company at one time had these trailers such as shown in Defendant's Exhibits C-1, C-2, and C-3. Do you still use those trailers?

A. No, we discontinued the use of this, oh, I don't remember how long it was. It was some time ago.

Mr. Boyken: I would like to show your Honor one of these, if you have not seen them. The tanks are on a trailer.

Q. These views are all of the same trailer, are they? A. They are all of the same trailer.

Q. Now, over what period of time did you use these tanks on the trailer that way?

A. For a period of about three or four years.

Q. Three or four years. That is between about 1941 and something like 1943 or 1944?

A. 1943 or 1944, some time in there.

Q. About the beginning of 1944?

A. I wouldn't place the month exactly, but I——

Q. Now, these tanks were all hooked up in line or manifolded, as we say? A. Yes.

Q. Were they individual tanks?

A. Yes, they were standard tanks.

Q. Standard tanks like these in here?

A. Yes, exactly. [87]

Q. Were they on any base of any kind?

A. The bed of the truck.

Q. The what?

A. They were on the bed of the truck.

(Testimony of H. P. McKoon.)

Q. But they were not on anything like this stand that I have? A. No.

Q. Which is the one you now use?

A. Yes.

Q. And they were the ordinary oxygen tanks on the bed of the truck? A. Yes.

Q. And you brought that up to the job?

A. Yes.

Q. Why did you discontinue using that?

A. Well, we had those in on two installations: One was at Moore's Dry Dock, who put in the Linde system, which Mr. Josephian was referring to a while ago, and the other one was at Best Foods, who put in their own plant. The other one was on a hydrogen service, rather than oxygen, and that was the Best Foods Company, who put in their own plant.

The Court: I did not hear what you just said.

The Witness: They put in their own plant to make their own stuff. In other words, we lost the account, lost the business of both places.

Mr. Boyken: Q. Then you only used these trailers for two accounts that you had?

A. The two very large accounts.

Q. The two very large accounts, and you moved that trailer with the oxygen tanks on there right up to the job, left the trailer there——

A. Yes.

Q. What did you do when all the oxygen was gone?

A. Brought [88] another one.

(Testimony of H. P. McKoon.)

Q. Brought another trailer to take its place?

A. Yes.

Q. You only used it on those two jobs, and the reason that you did not continue to use the trailer was that you lost the jobs. Why didn't you use them on some other jobs?

A. Well, in the first place, they are only adapted to a certain type of customer. You have to have room to spot the things, to leave it there, and not everybody uses in that quantity. That is a pretty big unit.

Q. You could have had smaller trailers?

A. Then it is uneconomical to run smaller trailers.

Q. In any event, you did not have to move the individual tanks around on those trailers, did you?

A. No.

Q. I understand you also were considering, or, at least, you thought you might use something like the units shown in Defendant's Exhibits A-1, A-2, and A-3, is that right?

A. Yes, we considered those.

Q. But you never actually used those?

A. No, we never actually used those.

Q. Now, with respect to those photographs, how many oxygen tanks did you have connected up in a unit?

A. Ten.

Q. And they are on a stand of some kind?

A. Well, they are on a base like that, which will take a lift truck underneath.

Q. Which will take a lift truck underneath?

(Testimony of H. P. McKoon.)

A. A steel base, a good deal like a pallet that is used in a warehouse. [89]

Q. They had legs under there, didn't they?

A. Yes.

Q. And you could get under them with a lift truck and those bases were, let me say, oblong in appearance?

A. Rectangular.

Q. Rectangular is a little better.

A. Rectangular.

Q. There wasn't anything circular like what you are now using? A. No.

Q. When was it you first used the form shown in Plaintiff's Exhibit No. 7?

A. Sometime around the first of last year, I would say. I didn't look up the date exactly.

Q. The first part of 1944?

A. 1945.

Q. 1945? A. Yes, sir.

Q. And you have continued to use those ever since, have you?

A. Yes. We have been using them for about, oh, a little over a year, now, I guess.

Q. How many of those units have you got?

A. Around a hundred.

Q. Do you deliver those units out to the customer's plant like Mr. Josephian does?

A. Oh, to some customers, yes. We have a few accounts lined up for them.

Q. Was that the first time, then, that you ever

(Testimony of H. P. McKoon.)

sold those four oxygen tanks together, in one cluster?

A. Yes, that is the first time we used the four-cylinder unit.

Q. The first time that you ever mounted four cylinders on a circular base was also in 1945, the early part, was it not?

A. That was the first time we used anything like that.

Q. When you take a four-cylinder unit like that shown here [90] in Plaintiff's Exhibit No. 7 to a customer, how do you take it there? On a truck?

A. Yes.

Q. There are a number of these on a truck?

A. Yes.

Q. Automobile truck, and then you take them off the truck and, as I understood you, you use this little hand truck? A. Yes.

Q. After you take it off the hand truck how do you spot it so that it gets in the exact position you want it?

A. Most of them you don't have to do any further spotting after you take it off the truck, because, as I explained, you have that stop there.

Q. I am interested in this that you have to build, that you have to do something to.

A. If you missed your spot an inch or two, you just inch it over.

Q. What does it roll around on? What portion of the device?

A. Well, you just rock it on the base.

(Testimony of H. P. McKoon.)

Q. You just rock it on the base?

A. Yes.

Q. Until it gets in the exact position so you can line it up with the other one? A. Yes.

Q. Prior to the time that you ever used such a device as that did you have a base that had a circular portion around underneath at all?

A. No.

Q. Why do you have to have a circular base and a circular track on there in order to get the hand truck underneath?

A. You don't. You can use any other steel. But that is very simple and inexpensive to press out.

Q. You could have used a square base, could you not? A. You could have.

Q. And you could have used a rectangular one as shown in Defendant's Exhibit A-1, A-2, and A-3, could you not?

A. Oh, yes, the square base would have been very satisfactory.

Q. A square one would have been very satisfactory? A. Yes.

Q. All you had to do was to raise it up high enough so you could get underneath?

A. Yes.

Q. Why didn't you use the form shown in Defendant's Exhibits A-1, A-2, and A-3, then?

A. Well, we wanted a four-cylinder unit that we could handle with a two- or three-wheel truck rather than this ten-cylinder affair. There wasn't a

(Testimony of H. P. McKoon.)

demand for the ten-cylinder affair that there was for the four-cylinder one.

Q. You could have made it a little smaller, couldn't you?

A. Well, it is out of proportion for that kind of a truck then.

Q. Now, you spoke about Mr. Molinari, and I understand he was first employed by you and then by Mr. Josephian. You say he was in business for himself at the time he designed your four-cylinder unit?

A. I never said he designed a four-cylinder unit.

Q. Who designed that, then?

A. That was worked out by Mr. McCabe and Mr. Molinari, and I had a finger in it, too.

Q. Who is Mr. McCabe?

A. He is the head of the shipping and traffic.

Q. And Mr. Molinari and yourself?

A. Yes.

Q. Now, you were familiar with the Josephian four-unit device at that time, were you not?

A. Yes.

Q. And Mr. McCabe was? A. Yes.

Q. And of course, Mr. Molinari worked for Mr. Josephian? A. Yes.

Q. So the three of you designed the unit that you now use? A. Yes.

Q. At that time you say Mr. Molinari was in business for himself?

A. He had come back and started to work there at his shop, which is down the other side of town.

Q. And he built your first unit at his shop?

(Testimony of H. P. McKoon.)

A. Yes.

Q. I don't know if you told us just when that was completed. I think you said when you first commenced using it, but when did he work on this?

A. I am not sure. I would have to look through the records.

Q. He built the first model you had?

A. Yes.

Q. Was it a full-sized device?

A. Yes.

Q. Four cylinders, just like the one in evidence here? A. Yes.

Q. And as shown in this blueprint?

A. Yes.

Q. Did you have the Josephian patent in front of you when you designed this device?

A. We were familiar with the Josephian patent.

Q. Is there a guard over this unit when you deliver it to the job, that is, the unit shown by Plaintiff's Exhibit No. 7? [93]

A. We do not ordinarily use it. We have a provision there for a cylinder rack, but handling it on our own trucks we do not.

Q. You have one painted in red, here?

A. Yes.

Q. Do you ordinarily put that there?

A. We do not ordinarily put that there.

Q. What do you use that guard for?

A. We provided it so you could use it. It gives protection to that extra valve. But handling it on our own trucks we do not in practice use it.

(Testimony of H. P. McKoon.)

Q. And you do not use it when you deliver the unit to the job? A. No.

Q. By the way, is the American Forge Company, of Berkeley, one of your customers? A. Yes.

Q. And they have some of these four-cylinder devices in unit form, such as Plaintiff's Exhibit 7?

A. Yes.

Mr. Boyken: I have no further questions.

Redirect Examination

By Mr. Lassagne:

Q. With respect to this unit, Plaintiff's Exhibit No. 7, Mr. McKoon, why is it that you are able to omit the conventional type of valve cap not only from the central valve but from the individual valves of the four cylinders?

A. We have the other valve guarded by position by that handrail up there, and we have—we can if we ever want to ship them by rail or any place where anybody objected to them being shipped without protection, provision for guarding [94] the other valve that stands up.

Q. Do you find any corresponding guarding of the valve in the Josephian device exemplified by Plaintiff's Exhibit 8? A. No.

Q. I hand you a further drawing, which I will ask to be marked for identification Defendant's Exhibit F, and I ask you what it shows.

(The document was thereupon marked Defendant's Exhibit F for Identification.)

(Testimony of H. P. McKoon.)

A. That is a drawing of the hand truck that I just had out there.

Q. You refer to the handtruck which is Defendant's Exhibit D, and I will offer this in evidence as Defendant's Exhibit F.

The Court: That shows the dimensions?

Mr. Lassagne: It shows the dimensions and the proportions of the hand trucks so we may have a pictorial record after the physical exhibits are withdrawn.

The Court: It may be admitted.

(The document previously marked Defendant's Exhibit F for Identification was thereupon received in evidence.)

Mr. Lassagne: No further questions, Mr. McKoon.

The Court: That is all. [95]

WILLIAM A. DOBLE,

called as a witness on behalf of the defendant; sworn.

The Clerk: Q. Please state your name to the court.

A. William A. Doble.

Direct Examination

By Mr. Lassagne:

Q. Will you state your qualifications, Mr. Doble, particularly in the field of mechanical engineering and patents which may be relevant to your quali-

(Testimony of William A. Doble.)

fications to give opinion evidence in this court regarding the structures here involved?

A. I specialized in mechanical engineering in university, leaving the university during the first World War to accept the position as first lieutenant in the ordnance department. After the completion of the first World War I associated with my brothers, specializing in engineering of high pressure steam power plants. During that time we used a great many tanks for welding and cutting purposes.

Later—and I would say for the past twenty years—I have specialized in a consulting practice, specializing in patent litigation, that is, preparing cases for trial, as well as analyzing patent situations for various manufacturers. I have acted as consulting engineer and helped them with the design of special machinery, and during the last World War I served in the ordnance department, which is the manufacturing department of the Government, and at one time had charge of the manufacture of 90 to 105 millimeter howitzers [96] at San Jose. I have studied the patent in suit and am familiar with that type of structure.

The Court: Q. Do you live out in Sea Cliff, San Francisco?

A. That is my mother's home, Judge.

Q. I knew there was a Doble who lived there below us where we used to live at Sea Cliff. You do not reside there?

A. No. That is my mother.

(Testimony of William A. Doble.)

By Mr. Lassagne:

Q. Will you outline briefly your previous experience for giving testimony in patent infringement actions in Federal courts?

A. I have experted in the case of Killifer vs. Roderick Lean, the case of Towner v. Bernice——

Q. Mr. Doble, I do not mean for you to enumerate them all, but give some idea of the number.

A. I would say twenty or thirty cases, at least.

Q. Will you explain to the court from your study of the patent document of Mr. Josephian involved in this suit what is described therein as the preferred embodiment of Mr. Josephian's invention, and what the novel and advantageous features stressed therein are?

A. May I use the easel and chart and pointer to point out the structure?

Q. Yes. This chart is simply an enlargement of the single sheet of the patent drawings.

A. Does this chart have an exhibit number?

Q. No, it is simply an enlargement of the first sheet of the patent drawings and the patent itself is in evidence. [97]

A. I will refer to the chart, which is entitled, "Tank Truck," and it is a chart of the patent to Josephian, No. 2,317,064, which is an enlargement of the only sheet of the drawings in this patent to Josephian.

The structure illustrated in the enlargement includes a truck mechanism, by which seven oxygen cylinders indicated by the reference character 1

(Testimony of William A. Doble.)

are nested together, six of the cylinders encircling the seventh cylinder, which is in the center of the group. That group of cylinders are mounted upon a base plate 8. A corresponding plate 6, having orifices 7 of such size as to nicely fit over the neck portions of the cylinders 1, is mounted upon the top of the seven tanks to hold them in adjustable position. Then the two plates are securely tied together by the tie rods indicated by the reference character 9, and nuts 10 located at each end of the tie rod 9 above the upper plate 6, and below the lower plate 8.

The seven tanks are all connected to a central valve 4, which is mounted on the top of the center tank. The manifold is shown by the reference character 13. By that arrangement an operator opening the main valve 4 may draw oxygen or other gas from all of the seven cylinders.

Welded to the bottom portion of the lower plate 8 is a circular track 11. As called for in that patent, the track is an annular member, circular in cross section, and [98] is welded to the plate concentric with the base plate. In normal operation the truck, as Mr. Josephian calls it, is mounted as shown in Fig. 1 with the lower edge of the circular track in engagement with the support 16.

One of the advantages of this structure, as brought out in the patent, is to provide a truck by means of which a plurality of gas cylinders 1 may be removed from one location to another by rolling. That is, the truck, including the seven

(Testimony of William A. Doble.)

cylinders shown in Fig. 1, may be tilted to the position shown in Fig. 3, in which case the periphery of the circular track 11, the periphery referred to by the reference character 12, engages the support 16 at a point of contact 17.

The operator, by engaging the upper portion of the structure may wheel or roll the unit to any place in the shop that he so desires, and in that connection I call attention to the patent, referring to the wording in the first column, page 1, line 50, reading: "It is another object of my invention to provide means for clamping a plurality of tanks into a unit which can be readily moved from place to place by tilting and rolling together with means for reducing the danger of upsetting."

Then again, commencing at line 54 in the first column at page 1 and continuing over to the top of the next page,—

"Under these conditions the tanks are easily handled, and even though the unit weighs in the neighborhood of 1000 pounds, the unit can be readily moved by tiling and rolling [99] without danger of the unit overturning."

I would like to also call attention to the paragraph starting at line 4 on page 2 in the second column.

The Court: Isn't this argumentative, Mr. Lassagne?

Mr. Lassagne: I think, your Honor, he is pointing out the structural features which will become important when we consider the claims.

(Testimony of William A. Doble.)

The Court: I can read this patent, too. I have never been particularly impressed with the method of presentation by which the expert reads the portions of the patent, because I have always felt that that was rather argumentative. If there is something that needs explanation in the device, of course, the expert can be helpful to the court in that regard. But this is comparatively a simple mechanical situation, and as ignorant as I am of complex mechanical things, I can understand this.

Mr. Lassagne: I am between two fires, or the devil and the deep blue sea in a situation like this, your Honor, because some courts have refused to consider patents, particularly prior art patents, in the absence of an explanation of them by an expert, and other courts will take the reverse position, that they can read them for themselves.

The Court: That is in cases where you have a number of other patents against which comparisons are made, it is, of course, helpful to have an expert point out the differences or [100] the similarities to the court. But in a case where I have just this patent, no doubt the witness has studied this matter and is familiar with it, but he is at the moment doing no more than reading the provisions of the patent and explaining the make-up of the device, which I already, I think, understand, because I have had it visually demonstrated to me, and it is comparatively simple to see. In fact, you can take it in with the eye and see it, which is something that you cannot ordinarily do with some of the

(Testimony of William A. Doble.)

patents. However, I suppose I am wasting more time in discussing this than the witness would occupy in concluding his statement. It is hard for me to pay attention to it, because I have already seen it. You have read to me some portions of this patent already, and I am not able to follow just what the point is.

Mr. Lassagne: We do not want to be repetitious, and I think we can proceed directly to the point with that expression of views.

The Court: We will adjourn until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until tomorrow, Wednesday, May 1, 1946, at 10:00 o'clock a. m.)

Wednesday, May 1, 1946, 10:00 o'clock a. m.

The Clerk: William Josephian vs. Stuart Oxygen Co. on trial.

WILLIAM A. DOBLE

recalled.

Direct Examination (resumed)

Mr. Lassagne: In view of the discussion at the close of the session last night, your Honor, I have made a diligent effort to confine my further examination of Mr. Doble to eliciting necessary answers to two prime questions: First, what did the plaintiff particularly point out and claim as his inven-

(Testimony of William A. Doble.)

tion in his patent, that is, what did he ask for a patent on, and, second, does the defendant's cylinder holder embody that thing in the case or any mechanical equivalent form?

Q. Mr. Doble, this patent and its title, repeatedly in its specifications and in its claims, calls the plaintiff's device a truck. What is the meaning of the word "truck?"

A. The common meaning of the word "truck" is a vehicle, and in that connection I will quote from Webster's New International Dictionary, published by G. & C. Merriam Company, 1919, appearing upon page 2206, and the second definition is as follows. This is the definition of truck:

"Any of numerous vehicles for transporting heavy articles, especially (a) a kind of handbarrow or hand cart consisting essentially of a strong braced frame terminating in a pair of handles at one end and supported [104] on a pair of small heavy wheels with broad rim.

"(b) A small heavy rectangular frame supported on four small wheels used instead of rollers for moving heavy objects, as on a floor.

"(c) Any of various small flat-topped cars for pulling or pushing by hand with or without a handle and sometimes with stakes or vertical ends to prevent the load from falling off. Used in shops, railroad stations, and so forth, for moving heavy articles.

"(d) Any strong heavy cart or wagon, horse-drawn or self-propelled, for heavy hauling."

(Testimony of William A. Doble.)

Q. In other words, it boils down to the fact that a truck is a vehicle for moving something as distinguished from a mere passive holder of a thing, does it not? A. That is correct.

Q. What is the descriptive term "truck" as applied to the plaintiff's patent?

A. The truck as described, illustrated and claimed in the Josephian patent is a vehicle for transportating a number of cylinders from one place in the shop to a second place in the shop. In other words, it is a transporting vehicle.

Q. Will you point out any structural feature of the plaintiff's device that particularly adapts it to serve as a vehicle rather than as a mere holder?

A. Yes, I can. In the plaintiff's device the structure which permits that truck to be used as a vehicle is a cylindrical track 11, which is welded [105] to the bottom plate 8.

Q. How is that particularly adapted to serve as a vehicle?

A. If I could have one of the models to demonstrate with, I could demonstrate clearly.

Mr. Lassagne: I will ask that this be marked for identification Defendant's Exhibit G.

(The model was marked Defendant's Exhibit G for Identification.)

By Mr. Lassagne:

Q. Will you identify the model which I have placed before you, Mr. Doble, and then proceed with your explanation?

A. The model which you handed me is Plain-

(Testimony of William A. Doble.)

tiff's Exhibit G for Identification, and is a model which was constructed under my direction by a model maker, and closely follows the drawings and teachings of the Josephian patent. It is a representation of the Josephian truck as illustrated in the drawings of that patent and as described in the specifications of the patent.

Your Honor, may I demonstrate this on your desk?

The Court: Yes.

The Witness: The truck is now placed in its first stable position. The welding at this particular locality in the shop has been completed. The patent teaches if, for example, welding is to be accomplished across the courtroom here, that the truck can be operated as a vehicle to convey the group of tanks to the locality for use. To do so the operator [106] will tilt the unit until the center of the gravity of the unit lies substantially over the point of contact 17, where the track engages the support, and then merely by rotating the unit, as I am now rotating this Exhibit G for Identification, we can transport the truck across the shop to the new locality.

In transporting the truck and rotating it, as I am now rotating the truck, to make it travel along the support, he soon obtains a point of balance so that the main effort that he has to apply to the truck is merely that of turning the truck structure so that it wheels along on the circular track 11. In other words, the circular track acts as a wheel in

(Testimony of William A. Doble.)

that case, the wheel of the vehicle, to move that structure to a new place of operation.

Mr. Lassagne: I offer Defendant's Exhibit G for Identification in evidence.

The Court: It may be admitted.

(The model was thereupon received in evidence and marked Defendant's Exhibit G.)

By Mr. Lassagne:

Q. Is there anything in the patent specification inconsistent with the thought that the plaintiff's patented device is designed to be transported on a conventional hand truck such as they have used in this court?

A. Yes. The patent clearly states that the truck or vehicle is to be operated or manipulated without the aid of any mechanical device, either transporting or spotting.

Mr. Lassagne: I will ask that this model be marked [107] Defendant's Exhibit H for Identification.

(The model was marked Defendant's Exhibit H for Identification.)

Mr. Lassagne: Q. I hand you a second model, which has been marked Defendant's Exhibit H for Identification, and ask you if you can identify it.

A. Yes. The model which you have handed me for identification Exhibit No. H is a model representing this Stuart holder, which I had made under my supervision by a model maker.

Q. Is the defendant's device which is in evi-

(Testimony of William A. Doble.)

dence as Plaintiff's Exhibit 7 here, of which the model you have just identified is a reduced scale exemplification a truck?

A. No, it is not, in the sense a truck as plaintiff's device is a truck, for this reason, that if we take the same example of having completed a welding operation on this side of the courtroom and wished to perform a welding operation on the opposite side of the room, a hand truck, specially-built hand truck, as illustrated in Defendant's Exhibit F, I believe that is, is used as the conveying vehicle or the truck to carry, bodily carry, the unit to the new place of location where it is to be operated.

Q. The defendant's hand truck was Defendant's Exhibit D? A. Exhibit D. Thank you.

Q. Can you point to any particular—

A. I hadn't quite finished, Mr. Lassagne. [108]

Q. I beg your pardon.

A. Pardon me, go ahead.

Q. Can you point to any particular structural difference between plaintiff's and defendant's devices which causes you to say that the plaintiff's is a truck while the latter is not?

A. Yes. In the plaintiff's device, plaintiff's truck, it is provided with a circular wheel, which acts as the wheel in transporting the truck in its normal operation. The unit is tilted until the center of gravity is substantially directly over the point of contact of that truck with the ground, and then acts as a wheel to transport the truck to where

(Testimony of William A. Doble.)

it is desired. In defendant's structure the base plate has a depression, which is also circular, but does not meet the specifications of the patent, in that it does not permit the unit to be tilted to a position where the center of gravity can be moved, or shifted directly over the point of contact of the depression in the base, and therefore does not act as effectively or efficiently, and in order to wheel the unit it requires an added force. The operator must not only then rotate the unit, but he must manually hold the unit in its tilted position. Where with the Josephian device it will balance in its operation of transporting it, the operator naturally will take the easiest way of transporting it, will balance it where the center of gravity is substantially over the point of contact of the track, and therefore we find a distinction in the two. [109]

The Josephian truck to be transported requires but a single force to be applied by the operator, whereas in the defendant's structure the operator must apply two forces, because the structure is not the same. The proportion of the ring 11, which is the wheel of the truck, is made sufficiently high and of sufficient diameter to enable the tilting of the center of gravity to be directly over the point of contact. That structure, mode of operation and result is not found in defendant's holder.

Q. What is the magnitude of the additional force pulling toward you that you told us the operator had to exert in moving the defendant's device?

(Testimony of William A. Doble.)

A. It will be somewhat greater than a minimum of six pounds. It probably would be in the order of ten to fifteen pounds.

Q. What is the force in the same direction that need be exerted in the case of the plaintiff's device, if any?

A. There will be no additional force required in that respect. It will balance when the center of gravity is over the point of contact.

Mr. Lassagne: At this time I will offer Defendant's Exhibit H for Identification in evidence.

The Court: Very well, it will be admitted and marked.

(Defendant's Exhibit H for Identification was thereupon received in evidence.)

Mr. Lassagne: Q. Now, referring to the models in evidence [110] as Defendant's Exhibits G and H, will you point out whether you find in the Josephian device a lower plate or base plate upon which the tanks were supported, and where that element is?

A. Yes. The base plate in the Josephian model, which is Defendant's Exhibit G, is the bottom plate upon which the seven cylinders are mounted.

Q. What element of the Stuart structure performs the structure of supporting the tanks?

A. In the Stuart carrier, Defendant's Exhibit H, there is a green plate at the bottom of the structure, upon which the four cylinders are mounted.

(Testimony of William A. Doble.)

Q. What do you find in the Stuart device which performs the function of holding a plurality of tanks in upright position at the top of the plate?

A. In the Stuart device I find a standard, a vertically extending standard, which is fastened to the base plate, and can be clearly seen in the stand which is on the floor of the courtroom. That standard extends vertically from the base plate and has four outwardly-extending wings, to which a nut structure is welded, and then a band surrounds the tanks and is secured to these metallic wings which project from the standard. In that way the four tanks are securely fastened, not to the base plate directly, but to the standard, which in turn is fastened to the base plate.

Q. How does this compare with the means disclosed in the Josephian patent for holding the tanks in upright position [111] at the top of the plate?

A. It is quite different from the means disclosed in the Josephian patent, and is shown in Defendant's Exhibit G. The means for clamping the cylinders to that truck include a top plate, which is identified in the patent by the numeral 6, and the lower plate or the supporting plate, which is identified in the patent by the numeral 8, and tie rods 9 with nuts 10 for clamping the two plates together, and the tanks between the two plates. In the Josephian device the tanks are clearly clamped to the bottom plate directly.

Q. Have you seen the devices illustrated in the photographs in evidence as Defendant's Exhibits

(Testimony of William A. Doble.)

B-1 to B-4, inclusive, those devices being identified as those used at the Western Pipe & Steel Company?

A. I have visited the plant of the Western Pipe & Steel Company and there I have observed and made close observation of about 33 tank carriers of the type shown in Plaintiff's Exhibit—Defendant's Exhibits D-1 to D-4 inclusive.

Q. Do they have a circular base plate supporting a plurality of cylindrical gas tanks?

A. Yes, they do. Shall I point out in the photograph and mark it where I find that supporting plate?

Q. I think it would be well if you have a large enough picture of one to do that.

A. Yes, this is a very good picture.

Q. Then mark the supporting plate A.

A. I will now mark the [112] supporting plate on Defendant's Exhibit B-1 with the letter A. Incidentally, there are several of the carriers shown in that same photograph, but I have added the "A" to the one in the upper right-hand corner.

Q. What means do those holders use for holding cylindrical tanks in fixed upright position on top of that plate you marked?

A. A means which is substantially the same as that used by the defendant in this case, that is, extending upwardly from the base plate A there is a standard. Projecting outwardly from the standard there is a wing forming a socket for each of the tanks, and at the upper end of the tanks

(Testimony of William A. Doble.)

there is a strap surrounding the tanks which engages the outwardly extending wings to clamp the tanks to that carrier.

Mr. Boyken: May I ask has the witness actually seen these or is he describing the photographs?

Mr. Lassagne: He has testified he has seen them.

Mr. Boyken: Q. Were you there when the photograph was taken, Mr. Doble?

A. No, Mr. Boyken, I was not.

Q. You have seen it recently? A. Yes.

Q. Was it the same as it is in the photograph?

A. As far as I can tell from the photograph it is identically the same.

Mr. Boyken: I see no good in describing this photograph unless you have seen those, yourself.

Mr. Lassagne: He has testified he has seen the devices.

The Witness: I have seen the devices, a great many of them. [113]

Mr. Lassagne: Q. Does the handrail structure of the defendant's device, which handrail structure surrounds the valves of the tanks mounted in the Stuart holder, constitute the mechanical equivalent of the upper plate designated 6 in the Josephian patent? A. No, it does not.

Q. Why do you say that it does not?

A. It does not for the reason that the upper rail which you have referred to on the Stuart device for protecting the valves may be entirely re-

(Testimony of William A. Doble.)

moved and the clamping means provided for the tanks will still effectively hold the tanks in their clamped position. There is no relationship whatsoever between the handrail and the clamping means for the tanks or cylinders.

Q. Now, will you point out where you find in the Josephian device the thing described in the language of the patent as a basal member fastened to the bottom of said lower plate and having a circular periphery centrally located with respect to the periphery of said plate to support said truck in upright stable position, said truck having a second stable position when tilted to rest on both of said peripheries only?

A. Yes. As I have pointed out before, the Josephian truck is provided with a circular track 11. It is also provided with a base plate 8, to which a circular track is welded. I am now pointing on the model Defendant's Exhibit G to the circular track 11 and to the place on the model where that circular track is welded to the base plate. That structure [114] is so proportioned, as called for in the patent, that when the unit is tilted from a first vertical position to a tilted position, that the center of gravity which I can point out on the enlarged photostat of the Josephian patent on the easel—the center of gravity of the Josephian truck is indicated in Fig. 1 of the patent with a large dot, slightly above the center of the tank structure, and is indicated or designated by the numeral 15, and in Fig. 1 the center of gravity rests within the center line of the structure. The Josephian patent

(Testimony of William A. Doble.)

defines that the diameter or the height of the circular track 11 must be such with relation to the diameter of the lower plate 8 that when the unit or truck is tilted to a second, or what we might call a second stable position as shown in Fig. 3, a vertical line dropped from the center of gravity indicated by the numeral 15 will lie between the point of contact of the circular track 11, which is indicated on the patent by the numeral 17, and the point of contact 20 of the bottom plate 8 with the supporting member 16.

That particular relationship, which is so thoroughly defined in the Josephian patent, brings the effective center of gravity between the contact point 17, the contact point 20, and as a result the truck is given a second stable position and will remain as Defendant's Model G remains in a tilted position, and likewise Plaintiff's Exhibit 8 will remain in that same tilted position or, as called in the patent, the [115] second stable position, and those structures, both the model, the device of the patent, and the commercial structure manufactured by the Josephian Company will remain in those stable tilted positions until a force is applied to swing the center of gravity back to a point slightly to the center side of the point of contact, at which time the unit will return to its first stable position.

I will demonstrate with the model, pressing on the upper end, turning it gradually, that we are approaching a balance where the unit will almost stand up by itself, and when I tilt it slightly beyond

(Testimony of William A. Doble.)

that, the unit will rock to its first or normal stable position.

Q. Do you find in the specification of the Josephian patent in suit any definition of what is meant by a second stable position? A. Yes, I do.

Q. Will you point out and briefly read from that part of the specification so that we may know where it is?

A. I am reading from the Josephian patent, page 2, column 1, line 59:

“In any event, the advantageous result of my invention can be accomplished by so designing the lower plate and its attached track so that there will be a second stable position such as that shown in Fig. 3 after the tank has been tilted.”

This simply means that the center of gravity 15 is to [116] lie between the vertical lines erected from the contacts 7 and 20.

Q. Is the point of contact 7 properly identified in the part of the specifications from which you just read?

A. No, that is an error in the patent. The point of contact referred to is No. 17 and not 7.

Q. How do you know that?

A. Because the patent states in another portion describing that point of contact, principally between the lines 15 and 20, the first column, the second page of this Josephian patent, and in other parts of the patent.

The Court: Q. 7 is really the point where the valve comes through, isn't it?

(Testimony of William A. Doble.)

A. Yes, your Honor, and 17, you will notice, in Fig. 3, is the point of contact. Both the drawings and the specifications indicate that the figure 17 represents the point of contact of the circular track 11 with the support 16.

The Court: It is apparently a typographical error.

The Witness: That is what it is, your Honor.

Mr. Lassagne: In his cross-examination Mr. Josephian characterized what he meant by a stable tilted position as follows, reading from page 52 of yesterday's transcript, line 21:

"Q. Incidentally, what do you regard as a stable position as the word is used in that patent? [117]

"A. I regard stable position with regard to the patent as a place where the unit stops and a greater force has to be applied in order to bring it on over before it falls down.

"Q. Don't you understand the term 'stable' as describing a position in which it will stay if you take your hands off of it?

"A. Not necessarily."

Do you agree with Mr. Josephia's definition of what the term "stable position" means?

A. Absolutely not. His own patent does not agree with him. His own patent defines a stable position as one in which the device, as I have illustrated, and in which Defendant's Model G now stands, as a stable position, where it will rest in that position until an outside force is applied to move it to some other position.

(Testimony of William A. Doble.)

Q. Do you find anything in the defendant's device in evidence as Plaintiff's Exhibit 7 susceptible of being described by the language "A basal member fastened to the bottom of said plate and having a circular periphery centrally located with respect to the periphery of said plate to support said truck in upright stable position, said truck having a second stable position when tilted to rest on both said peripheries only"?

Mr. Boyken: Are you reading from the claim of the patent?

Mr. Lassagne: Yes.

Mr. Boyken: Which claim is that? [118]

Mr. Lassagne: Claim 2, I believe.

A. No, the Stuart structure, the defendant's structure, does not include that specification, for this reason—and that is really the essence of the entire invention. I will demonstrate with Defendant's Exhibit H. If I apply a force to tilt that structure from its normal stable position where the tanks are upright until the lower ring or supporting base engages the floor or supporting member and remove my hand, the unit will immediately and definitely return to its first stable position. I would like to demonstrate that with a large model also to show how it corresponds to the small model which we have produced as Defendant's Exhibit H.

Q. Please do so.

A. I am now applying a force to Plaintiff's Exhibit 7 to tilt Plaintiff's Exhibit 7 from its normal vertical position to a point at which the outer edge

(Testimony of William A. Doble.)

or periphery of the lower base member engages the aluminum plate on the floor. Now, I will raise the tank-holding mechanism and it will be noted the manner in which the unit returns to its one and only stable position.

Defendant's device does not include the structure which you have read because it does not meet with that definite specification set forth in that portion of the claim, namely, that the unit will have a second stable position, and to make the unit have a second stable position the Josephian device of the patent definitely proportions either the diameter of the circular [119] track or the height or depth to which the circular track projects below the lower surface of the base plate. That is a definite relationship with the periphery of the lower plate. Now, that must be maintained in a certain order so that you can obtain the claimed features of the Josephian patent, namely, that when the device is rocked from its first stable position, the center of gravity may traverse the point of contact of the circular track and then move to a second stable position. That is totally missing from defendant's structure, as I have demonstrated. It will not stay in a second stable position. It has no second stable position.

The Court: Q. Before you leave that, irrespective of the claim of the patent, what is the mechanical difference between the two rings?

A. That is a good point, your Honor. The mechanical difference is that the right on defendant's

(Testimony of William A. Doble.)

device is made substantially with less height, so that the center of gravity will not swing over the contract point 17. There is a definite mechanical limitation so that that structure cannot be put in a position where the device swings to a second stable position.

Q. If the ring that is on the defendant's device were widened so that the proportion would be the same, as in the case of plaintiff's device, it would result in the center of gravity that would enable it to have the secondary position of plaintiff's device?

A. That is the point. It takes a minor [120] change in the structure to bring about that advantageous feature, which is the claimed feature, and which is the essence of that patent all the way through.

Q. The fact that there is a flat surface on the bottom of the ring of the defendant's device is immaterial?

A. It is immaterial. That could be a ring just as well.

Q. If this were a rounded surface but of the same width, it would have the same effect as it has with a flat surface?

A. Yes, your Honor. Defendant's device is made with the depression in the bottom plate because it is an economical, inexpensive, readily fabricated base.

Q. Do you mean it would be easier to make this round surface than a flat surface?

(Testimony of William A. Doble.)

A. No, your Honor, it is just as easy to make it either way. With a flat surface it has this advantage: You have a better support. Say on a wooden floor you have a little more supporting area with a flat surface than you would have with a ring such as used in the Josephian structure where it is round, and you only have a line contact with the supporting surface instead of a flat broad surface such as defendant's structure has.

Q. I will ask this next question with some hesitation, because I am afraid your Honor may regard it as too elementary, but I think it is highly desirable for the record.

The Court: Don't take that for granted, because you will remember that famous story about the lawyer who went to the [121] Supreme Court and who wanted to tell the judges about some simple statutory provision, and the judges said, "You do not have to tell us about that. We know that."

The lawyer said, "I made that mistake in the court below and I want to be sure about it."

So you go ahead and ask the elementary question.

Mr. Lassagne: Q. I would like to have you explain, Mr. Doble, with reference to this text entitled, "Experimental Mechanics", published by Macmillan & Company, in 1888, what is meant by the term "Center of gravity of an object"?

A. Referring to the text entitled, "Experimental Mechanics", published by Sir Robert Stallwell Ball in 1888, defines the center of gravity as follows, and I am reading from page 57:

(Testimony of William A. Doble.)

“Center of Gravity. We proceed to an experiment which will give an insight into the curious property of gravity. I have here a sheet of iron, Fig. 27. Five small holes, A, B, C, D, and E, are punched at different positions on the margin.”

Q. I suggest that you refer to the blackboard diagram which we have drawn from the book.

A. I have drawn on the blackboard a diagram which in a way corresponds to Fig. 27 in the book. My diagram is not quite perfect, but it represents what the book is talking about. The five small holes in the plate are indicated by A, B, C, D, and E, and those are around the margin of an irregular, say, sheet metal plate. [122]

“Attach to the framework a small pin, from which I can suspend the iron plate by one of its holes A. In back of the plate there is a supporting structure which is a small pin, which projects through the hole A in the plate. The plate is not supported in any other way. It is free to swing. It hangs freely from the pin, around which it can easily turn. I find there is one position, and only one, in which the plate will rest.”

In other words, ending the quotation for the moment, there is only one position with the pin A and the plate at which it would rest. That would be a stable position.

Continuing with the reading:

“If I now withdraw it from that position it will return there after a few oscillations.”

In other words, it will be like a pendulum. If

(Testimony of William A. Doble.)

the plate were swung to either side, it would swing back and forth until it again returned to its point of equilibrium, and I might interpose here that in swinging the plate, each time you will be lifting, which will later be pointed out as the center of gravity. Force must be applied to lift that center of gravity from its stable point.

“In order to mark this position I suspend a line and plummet from the pin.”

Interposing again, I indicate on the blackboard a line extending from A down to a weight. [123]

Continuing with the reading: “Having rubbed the line with chalk”—in other words, we rub the line with chalk—“I allow the line to come to rest in front of the plate. I then flip the string against the plate and then produce a chalk mark. This, of course, traces out a vertical line A-P.”

The point P is the center point, which I have now indicated on the sketch on the blackboard.

“I now remove that plummet and suspend the plate from the last hole B.”

We will now remove the plate, take it off, and move the plate until point B engages the pin in the same manner.

“I repeat the process, thus drawing a second chalk line B-P, and so on with the other holes,” until we get five lines on our plate.

“and thus obtain five lines across the plate represented by dotted lines in the figure. It is a very remarkable circumstance that these five lines all intersect at the same point P.”

(Testimony of William A. Doble.)

I am trying to draw the five lines so that they will all intersect at the point P.

“This remarkable point is called the center of gravity of the plate, and the result at which we have arrived may be expressed by saying that the vertical line from the point of suspension always passes through [124] the center of gravity. At the center of gravity P a hole has been bored, and when I place a supporting pin through the hole you will see that the plate will rest indefinitely in all positions. This is a curious property of the center of gravity. The center of gravity may in this respect be contrasted with another hole Q.”

And then in the figure the author draws a small hole Q to the side of the P, which I will now place and so designate on the blackboard.

“The center of gravity may in this respect be contrasted with——”

I guess I did not start reading in the right place——

“The center of gravity may in this respect be contrasted with another hole Q, which I have just drawn, which is only an inch distance from the hole P. When I suspend the plate by this hole—that is the hole Q—it has only one position of rest. That is, when the center line P is vertical beneath Q. Thus the center of gravity differs remarkably from any other point in the plate.”

In other words, if we put a pin through the hole Q, the plate will immediately swing down until the vertical line extends through P to Q.

(Testimony of William A. Doble.)

Q. Now, Mr. Doble, what is the position of the center of gravity [125] of the Josephian unit illustrated in his patent drawing controlling in determining whether the unit will be stable in its tilted position as shown in Fig. 3 of the patent drawing?

A. Referring to Fig. 3 of the Josephian patent and pointed out on the enlargement thereof on the easel, it will be observed that the vertical line from the support passing through the center of gravity 15 lines between the contact point 17 of the track 11 and the contact line of the bottom plate 20, with the same support 16. Therefore, the structure will rest stably and definitely in that position until a force is applied which will cause the center of gravity to rise about the point 17 if the unit is tilted toward its first stable position or rise from a point acting as the hinge at 20 if the unit is swung all the way over. In order to cause the center of gravity to rise, it requires force, either manually or by some other means, and therefore a stable position is arrived at when the center of gravity reaches its lowest point with relation to the support and requires a force to lift that center support for moving it to shift its location between those two points.

Q. In the Stuart device, Plaintiff's Exhibit 7, when it is moved to the position where the edge of the tank supporting plate and the depression portion of that plate are both in contact with the supporting floor, where is the center of gravity of that unit?

(Testimony of William A. Doble.)

A. The center of gravity of that [126] unit—I can illustrate on the same Figure 3—would not lie between the points 17 and 20, but would lie between the point 17 and the center line of the track. It would probably be at a point which I will indicate on this drawing at “30,” because in the Stuart structure we do not have the circular track so proportioned in relation to the periphery of the lower plate 8 that the center of gravity can be swung to a point beyond the point of contact of that circular track with the support. It at all times remains on the center side of that track contact with the support.

Mr. Lassagne: Inasmuch as the witness has illustrated his testimony by marking on this enlargement of a sheet of the Josephian patent drawings, I would like, with Mr. Boyken’s consent, to offer it in evidence as defendant’s exhibit next in order.

The Court: Hasn’t that been admitted?

Mr. Lassagne: No, this was merely illustrative before.

The Court: Let it be marked.

(The document was received in evidence and marked Defendant’s Exhibit I.)

Mr. Lassagne: Q. Now, referring to the drawing which was admitted in evidence yesterday as Plaintiff’s Exhibit 6, which purports to represent the defendant’s structure, have you made a comparison of that drawing with the blueprint of the

(Testimony of William A. Doble.)

defendant's device which is in evidence as Defendant's [127] Exhibit E?

Mr. Boyken: Your Honor, this is pointless.

The Court: Yes, I do not think you need to go into that. He said it was not accurate as to dimensions. The blueprint which you offered, and the testimony supported it, showed it was inaccurate. I think with that statement in the record there is no point in taking up the time on that. So far as accuracy of dimensions is concerned, the court will consider the blueprint which you have produced. Counsel's exhibit is only to show generally how it looked rather than being an accurate portrayal.

Mr. Lassagne: Your Honor, it is more than a question of dimensional accuracy. It is a question of the relative proportion of parts, which is extremely important in this case, and that drawing to me is so obviously, in the light of three or four answers, I can elicit here evidence of the over-reaching of it. I feel it extremely desirable to have a very short point on it.

The Court: You can do it, but you are protected in the record by the statement of the court and the statement of counsel, and the models are before the court. I can see what the models look like. It seems to me you are fully protected in the record on that, so that it is unnecessary to point out on the diagram something that is admitted already, namely, that it is not clear—— [128]

Mr. Lassagne: Just the extent of departure then. I will cut it down to take as little time as possible.

(Testimony of William A. Doble.)

The Court: Have the witness it does not correctly represent the proportions, or something of that kind, if you want that.

Mr. Lassagne: Q. Understanding that you have made a comparison of this drawing, Mr. Doble, with the blueprint of the defendant's device in evidence as Defendant's Exhibit E, will you indicate with reference to the illustration of the depth of the depression in defendant's base plate, with reference to the diameter of the plate, what percentage of exaggeration there is present in this drawing, if any?

A. I have made the comparison which you have stated and I find an error of $58\frac{1}{2}$ percent in the depth of the depression in the plate shown in Fig. 4 on that exhibit.

Q. Will you mark on the exhibit with pencil the particular dimensions to which you have referred and the percentage of its exaggeration?

A. I have now marked on Plaintiff's Exhibit 6 the dimensions from the lower side of the base plate to the bottom of the deformed portion of that plate, and I find an error or exaggeration there of 58 and approximately a half percent, which might materially change the mode of operation of defendant's structure.

Q. Now, Mr. Doble, considering particularly the basal member fastened to the bottom of the base plate of the patented device, [129] on the one hand, and the tank-supporting plate with its circular depression embodied in the defendant's device on the

(Testimony of William A. Doble.)

other hand, is it your opinion that they perform substantially the same function in substantially the same way to obtain the same results, or that they perform different functions, or in a different way, or produce a substantially different result?

Mr. Boyken: Isn't that the conclusion of the court, really, that determines the question of infringement? I do not mind hearing this witness' opinion on it, but it seems to me the question is incompetent, because that is just what the court is to decide.

Mr. Lassagne: It is a question on which the witness is expected to assist the court, because they are all mechanical and engineering considerations.

The Court: I think it does somewhat invade the province of the court, but let him answer.

The Witness: The defendant's structure is structurally different. It operates by a different mode of operation and produces a different result.

Mr. Lassagne: You may cross-examine.

The Court: We will take the morning recess at this time.

(Recess.) [130]

Cross Examination

Mr. Beckley: Q. Mr. Doble, I show you again Defendant's Exhibits B-1 through B-4, which I believe you testified were units in use at the Western Pipe and Steel Company; is that right?

A. That is correct.

Q. I believe you also testified that you had seen those types of devices in operation?

(Testimony of William A. Doble.)

A. Yes, I have.

Q. Can you tell me whether or not the tanks which are shown on those photographs were manifolded together?

A. Some of them were, not all of them.

Q. Are the tanks which are shown in those photographs all of the same type?

A. No. The unit is equipped with four tanks for oxygen and one for acetylene. The acetylene tank is a little larger in diameter and a little shorter in height.

Q. So those have not been manifolded together?

A. No. The acetylene would not be manifolded with the oxygen, but the four oxygen tanks would be manifolded together. In some of the units I saw they had all tanks of oxygen and none of acetylene in each carrier.

Q. Where did you see those units?

A. At the same place.

Q. Where was that?

A. The plant of the Western Pipe and Steel Company, South San Francisco.

Q. At what time was that?

A. Time of day or time of year?

Q. No. Time of year?

A. I made a note of that. It was on [131] February 8 and we arrived——

Q. Of what year?

A. Of this year, 1946; we arrived at the plant at two o'clock.

(Testimony of William A. Doble.)

Q. The units which you saw were all single in February of this year?

A. That is correct.

Q. In moving those units about how was that accomplished?

A. In transporting them or conveying them the unit was provided with an "I" at the upper end of the standard and lifted by a crane. However, if they were to be moved an inch or so the operator could move them the same as these units are moved, by edging over the device.

Q. They were actually tilted and rolled?

A. Well, you don't have to tilt those to roll them. You inch them over to alignment onto the pipe line. That would only be about the distance, not a considerable distance.

Q. Are you referring now to plaintiff's Exhibit 7 and plaintiff's Exhibit 8?

A. Yes. I can demonstrate what I mean by shifting them without tilting.

Q. You can shift them without tilting?

A. Without materially tilting them, yes.

Q. I wonder if you would demonstrate that to the Court?

A. I would be very glad to. First I will demonstrate on Plaintiff's Exhibit 7. If the manifolding pipe was slightly out of line with the valve the unit can be switched or shifted on its base by applying a twisting force to the edge. That is [132] the way it is usually moved. When they are spotting a unit in the plant to line it up with the manifold

(Testimony of William A. Doble.)

in the same way I now shift the plaintiff's device, Plaintiff's Exhibit 8, in the same way an operator may shift the carrier of the unit at the plant of the Western Pipe and Steel Company which are shown in Defendant's B-1 to B-4.

Q. On your direct examination you were demonstrating to the Court that Defendant's Exhibit G could be rolled along if it was desired to move that unit either in the model or in a full sized unit on the lower track, and I would like to ask whether or not the defendant's device could not be rolled along in that same manner on the track along the depression, the lower portion of this base plate?

A. No, it can't in the same manner, for as I pointed out, the particular feature of Josephian's device is to provide proportioning of a track with relation to the periphery of the base so the unit may be tilted until the center of gravity is directly over the contact point of that track with the support. Then it requires merely a turning action to transport that to the new locality, whereas in Defendant's structure, and I will demonstrate with Defendant's Exhibit H, which is a rather small model of Defendant's commercial device, the bottom plate is not proportioned with relation to the periphery of the outer plate to enable accomplishment of that result. In other words, in defendant's device it cannot be tilted until the center of gravity [133] reaches the point of contact with the depression referred to. Therefore, unlike Plaintiff's device that merely may be twirled and in twirling

(Testimony of William A. Doble.)

Defendant's Exhibit G for transportation, Defendant's unit in being rotated must always be maintained in its tilted position. It requires two forces against a single force to advance the unit along the ground.

Q. When I asked the question to which you have just given this statement I don't believe that I mentioned anything about the center of gravity. I asked you whether or not the defendant's device could be rolled along the depression at the bottom of the base plate while it was tilted to transport it from one place to another?

A. I believe you said in the same manner. It is not transported in the same manner.

Q. Will you answer the question I just asked?

A. Answering your new question, Defendant's device may be rolled on its point of contact of the depression with the support by the operator applying force from two directions.

Q. How much force is this new additional force which you apply? I believe you stated on direct examination that that might be as small as five pounds?

A. That is not correct. I stated it might be as low as six pounds. Demonstrating with Defendant's Exhibit H. that holds the model in the tilted position under the most favorable conditions that we were able to arrive at, it required six to eight pounds force. However, in moving the unit, rotating the unit, it would not be advisable [134] to tilt it to the position which the periphery of that lower plate

(Testimony of William A. Doble.)

engaged the support and engages the ground; it would be better to balance the unit something in that position, which would require a greater force (demonstrating). However, the units are never transported that way. They are always transported by a truck.

Q. You say they are never transported that way?

A. Any distance, yes. Just a foot——

Q. What do you mean by any distance?

A. I mean across the room here. It is much easier to transport them on your truck.

Q. They may be transported a couple of feet in that way, though? A. They could be.

Q. You were speaking in your direct examination on the position of a line through the center of gravity when either the defendant's or the plaintiff's units are in a tilted position. If we refer to Defendant's device when it is resting both upon the track and the periphery of the base plate—you marked on Defendant's Exhibit I a Point 30, at which you said you thought probably the line through the center of gravity would pass. Let me ask you whether or not you have made measurements on Defendant's device to determine the exact position of this center of gravity?

A. No, I have not, but by demonstrating you could very clearly or very easily see. I am now demonstrating with Defendant's Exhibit H. In tilting that unit we never arrive at a point where the unit tends to balance on the [135] edge of the depression which contacts the supports. It always will

(Testimony of William A. Doble.)

return to its fixed or permanent stable position. Therefore, the center of gravity is not reached. In swinging from a central position to such a point as the Point 17, referring to Defendant's Exhibit I, it must lie between the Point 17 and the center of depression. It cannot lie on that point of contact or beyond it. It must lie within it.

Q. How far within the periphery of the track does it lie? A. I don't know.

Q. Have you any idea?

A. No, I don't have an idea. However, it is some little distance because of the action you get upon releasing the tank——

Q. You never carried on any experiments to tell where that might be?

A. No, I have not.

Q. As a matter of fact, you can't find the center of gravity of the defendant's device by the method which you demonstrated on the board?

A. No, you would not obtain the center of gravity that way. That was a simple illustration of what that center of gravity is and how it acts.

Q. You referred in your direct examination to the term used in the patent, "the second stable position". Would you define that for the Court, what you mean by "the second stable position"?

A. Yes; I would be glad to define what I mean. I will take the patent's definition for it.

Q. I am asking you for yours.

A. Well, I agree with the [136] patent. It

(Testimony of William A. Doble.)

doesn't matter what I—it is what the patent says. I agree with what the patent's definition is.

Q. Will you give the Court your definition of “the second stable position”?

A. I will read my definition from the patent.

Q. All right.

A. I will read from Page 2, first column, starting at Line 59:

“In any event, the advantageous result of my invention can be accomplished by so designing the lower plate and its attached track, so that there will be a second stable position, such as that shown in Fig. 3 after the tank has been tilted. This simply means that the center of gravity 15 is to lie between vertical lines erected from Contacts 7 and 20”.

That really means 17 and 20, it must be a typographical error.

Q. Does that mean to you that the advantageous result could not be accomplished in any other way?

A. I don't understand your question.

Q. I am asking, reading from the patent—I am not reading from the patent, but “the advantageous result of my invention can be accomplished” by doing these things which you have read. Does that mean that it cannot be accomplished in any other way?

A. No, it cannot be accomplished in any other way that I know of and comply with the terms of the patent and its clear [137] specifications.

Q. I am not asking you that. I am asking if in accordance with your definition of the term “the

(Testimony of William A. Doble.)

second stable position” whether the patent in the portion which you have just read means that the advantageous result of the intention could not be accomplished in any other way than is defined in that specification.

A. I don’t know that I should speculate on any other ways that the stable position may be obtained. The patent defines how a stable position is to be obtained. That is the teaching in the patent. That is the teaching, the way it ought to be done. Whether it may be done some other way is immaterial. I am not interested in it.

Q. You don’t know whether it can be?

A. I have never investigated it.

Q. Does the term “stable position” to you mean a position of rest?

A. Yes, position of rest such as shown in the patent.

Q. Will it require a force to be exerted to move that?

A. From a position of rest? If it is not at rest——

Q. It is not stable?

A. Not as defined in the patent.

Q. Can you show me where “stable” is defined in that patent to mean that the device is at rest?

A. Yes. Figure 3 shows the device at rest. In that figure it is shown in a stable position.

Q. Can you find where it says that Figure 3 is the only position [138] in which it is stable?

(Testimony of William A. Doble.)

A. No. It has two positions in which it is stable. Figure 1 shows it in another position.

Q. Can you find the definition in the patent where it says that the stable position is one at rest and can be no other?

A. Not in those words, but the drawings and the specification define a structure which can have no other interpretation.

Q. I believe in qualifying you as an expert witness you stated that you were a major in ordnance; is that right; or had for some years been in charge of ordnance work for the Army?

A. During the First World War I was a lieutenant assigned to ordnance work. In the Second World War I was assigned to ordnance work as a major and then lieutenant-colonel.

Q. What were your duties there?

A. My duties were varied. During the first portion of my duties with the San Francisco Ordnance District in the Second World War I had charge of the Production Service Branch of the Industrial Division from June 1, 1943, until the end of the war. I had charge of manufacture of 105 millimeter gun carriages at the San Jose manufacturers.

Q. Are you familiar with the operation of, was it 95 millimeter——

A. 105.

Q. 105 millimeter guns?

A. Not particularly. I am interested in the manufacture, not in the use.

Q. Have you ever seen one fired?

A. No, I have not.

(Testimony of William A. Doble.)

Q. Have you examined the barrel of one?

A. Yes. [139]

Q. Was it rifled? A. Yes.

Q. What was the purpose of that, do you know?

A. Certainly.

Q. What was it?

A. To give the projectile a rotation.

Q. Once the projectile is in flight would you say it is stable?

A. No, it is not stable.

Q. What is it?

A. It is unstable, it is subject to gyrations. It is moving forward and it is also rotating and it is gyrating, all at the same time. Certainly it is not stable.

Q. It is not stable?

A. No. It varies. It is continuously changing its course with the force of gravity acting on it at all times during its projectory. It is a nice mathematical problem to figure out which we haven't carried out in——

Q. Then you are familiar with their projectile flights? A. To a minor extent.

Q. Do I understand you to mean that because the projectile is moving forward it is not in a stable position?

A. No, it is not in a stable position. It is continuously changing direction. It is an ever changing position in any direction.

Q. I am not asking you that. I am asking whether it is in a stable position?

(Testimony of William A. Doble.)

A. I will say it is not in a stable position. It is in a changing position, continuously moving.

Q. The rifle barrel of which you spoke, why was that barrel rifled?

A. They are rifled to give the projectile a rotation [140] which tends to keep the projectile from rolling over and over, end onto end. It tends to keep it more in a direct path. However, that operation is not perfect. It tends to correct the situation, it makes the firing of the gun a great deal more accurate than if you did not have it rifled.

Q. You would not say it increased the shell's motion in flight?

A. Yes, it does. It tends to cut down the gyrations of a shell, not cutting down the flight.

Q. Then it is more stable than it would be without the rifling?

A. Certainly, but it is not stable in any sense of the word; merely more stable in a sense of something that is continuously changing.

Mr. Beckley: That is all.

Redirect Examination

Mr. Lassagne: Q. Is the fact alone that this unit, Plaintiff's Exhibit 7, will not stand in tilted position when you take your hand off it, sufficient proof that the center of gravity is not moved outwardly from the center of the unit beyond the point of contact of the depressed portion of the base with the floor?

A. It is an absolute proof that the center of

(Testimony of William A. Doble.)

gravity has not moved beyond that point or has not even approached it.

Q. Now, with respect to whether the center of gravity under those conditions is positioned on the line, the point of contact 17, as the point is indicated in the Josephian patent, or [141] whether it is an infinitesimal fraction of an inch inside of that or an infinitesimal fraction outside of that, is that difference in position of the center of gravity just a matter of degree, or is it critical in determining the mode of operation of the holder?

A. It is critical in determining the mode of operation as clearly demonstrated by Defendant's structure which will not maintain a second stable position, and as demonstrated by Plaintiff's structure, which will maintain a second stable position. That is brought about by the passing of the center of gravity over the point of contact of the Track 11 with its supporting structure at the point 17.

Mr. Lassagne: That's all. [142]

Recross-Examination

Mr. Beckley: Q. Mr. Doble, do you know how much you would have to increase the depth of the depression on the bottom of the defendant's device which is in evidence as Plaintiff's Exhibit No. 7 before the center of gravity would fall outside the periphery of that depression when it was resting on the edge of that depression and on the edge of the base plate?

A. No, I have not made that determination.

(Testimony of William A. Doble.)

Mr. Beckley: I would like the record to show that Plaintiff's Exhibit 7 is now resting with the edge of the depression on an aluminum plate on the courtroom floor and with the edge of the base plate on the courtroom floor, and that the aluminum plate——

Mr. Lassagne: Do you wish to be sworn? I suggest that you put that in the form of a question to the witness.

Mr. Beckley: All right.

Q. Mr. Doble, do you see the position in which Plaintiff's Exhibit No. 7 is now resting?

A. Yes, I see that position. It is not a normal position.

Q. Will you explain to the court for the purpose of the record the position which it now occupies?

A. May I get down and look at it?

Q. Surely.

A. I have examined Plaintiff's Exhibit 7, which is the Stuart holder, which has been placed in a position by Mr. Beckley, in which position the edge of the dish portion [143] of the base plate is resting on an aluminum plate, which in turn is resting upon the courtroom floor. The unit is overhanging the aluminum plate and is tilted until the peripheral edge of the dish plate engages the linoleum of the courtroom floor, thereby increasing the angle of tilt so that the center of gravity has passed over the point of contact of that dish portion and now lies between that point of contact of the dish por-

(Testimony of William A. Doble.)

tion and the peripheral edge of the supporting plate.

Q. Will you state whether or not the unit is resting in that tilted position with no external forces being applied to it? A. That is correct.

Q. Will you state the approximate thickness of the aluminum plate on which you said the dish portion rested?

A. I can measure it and give you a more exact figure than guessing at it.

Q. Will you do that, please?

A. I have applied a scale to the edge of the aluminum plate, and as closely as I can tell, the plate is approximately $3/16$ of an inch thick.

Q. Would you say, Mr. Doble, that Plaintiff's Exhibit 7 is now in a stable position?

A. Yes, it is.

Mr. Beckley: That is all.

The Court: Q. That means that if the basal member were thickened by $3/16$ of an inch on the defendant's device it would come to rest in the same manner as plaintiff's device does? [144]

A. Well, yes, to this extent, your Honor. I do not think that was quite a fair test, but it does show the critical height of that basal member.

Q. Putting it in plain simple language, it is just a matter of how thick it is?

A. That is right, how thick, or how large in diameter. You can vary it in either of two ways, either by thickness or diameter.

Q. The defendant's device, to use a boyhood ex-

(Testimony of William A. Doble.)

pression, teeters and then comes to rest; the defendant's device comes to rest in a secondary position; that is right, isn't it?

A. That is correct, your Honor, if it is moved.

Q. Is there any particular advantage, one against the other, in either one of those methods of so-called security?

A. Mr. Josephian seems to think it is quite an advantage in his particular structure.

Q. I am asking you, does it make any difference? The device of the defendant moves but it comes back to rest in its original position; the device of the plaintiff moves and at some point in its movement it stops and comes to rest there. There isn't a great deal of difference there from the utilitarian point of view, is there?

A. Yes, I think there is quite a good deal, your Honor, in this: If we notice, we will tilt defendant's exhibit H, which is the small model, and we will release it. That is, I gave it its maximum tilt, released the unit, and it swung back and forth. I can tilt [145] the small model of plaintiff's structure, which is Plaintiff's Exhibit G, a similar amount and it will also teeter back and forth. Now, the utility in the invention of Josephian's in that we can tilt his farther and thereby bring the center of gravity directly over the point of contact of the basal member, as you call it, your Honor, and therefore the operator can wheel that along the ground with less effort.

Q. And then this is better?

(Testimony of William A. Doble.)

A. This is a better device in that respect, yes.

Q. And the defendant's device is not quite as good?

A. It is not as good in that respect and we do not use it. The defendant does not use that, your Honor. The whole thing is this: When he wants to move his device he uses a hand truck. The patented device, to move it, he wheels it along the ground. They both have a different mode of operation and use, and in order to get the wheeling effect safely, Josephian provides that second stable position so that if he happens to release the unit, that is, the operator releases the unit as I am demonstrating this Defendant's Model G, when the center of gravity is beyond that point it will come to a second stable position and not tip over on him.

Q. This so-called second stable position is not of much importance from the utilitarian point of view, is it? The main utility is in the ease with which the device is moved, isn't it?

A. That is a safety feature, your Honor, which has utility [146] in being a safety factor.

Q. It is not nearly so important as the other?

A. As being moved?

Q. Yes.

A. I think they both have equal importance. These cylinders are heavy, and if it tips over on a man——

Q. They both come back to the same position?

A. But they do not, your Honor.

Q. I mean they both have a means of being made

(Testimony of William A. Doble.)

secure—put it that way. In one case the thing teeters back to its original position, and in the other, if it is moved over it will stay in a non-vertical position?

A. I think you have the same thought we have.

Q. I am not sure about that. I just want to find out.

A. However, the important thing is that is what the Josephian patent calls for. That is the thing he asked for and that is the thing the Patent Office gave him, is just the difference between the demonstration of those two models. His invention is based on that demonstration of stability.

Q. If that is correct, if a man makes a model and if it does not operate quite so good as the fellow who had the patent, he escapes the result of what might be called infringement?

A. That would be true if he got the same result, but you do not get the same result. You do not get the advantages in the Stuart shop because Stuart are not interested in the advantages Mr. Josephian has. They do not move their unit [147] by rolling. They have a specially-made truck, and operators are lazy. The easiest way is to move it by hand truck.

Q. Wouldn't he, the defendant, be better off to have the basal member in the same way, constructed in the same way that the plaintiff's member is constructed?

A. No, because they do not use it, your Honor.

Q. It would not do them any harm?

(Testimony of William A. Doble.)

A. It wouldn't do them any good, and there is no utility in having it.

Q. You say the plaintiff's device moves a little easier. There would be that advantage?

A. The plaintiff's device has advantages the defendant's device does not have, if you try to follow the mode of operation of the plaintiff's device. But defendant's device does not operate that way. They do not use it that way. They use a hand truck to move it.

Q. They could use a hand truck with the same kind of basal member the defendant has, couldn't they?

A. They could, but they do not, and that is the difference. These two structures illustrate the difference between——

Q. I can see there is a difference——

A. That is the difference the patent is addressed to.

Q. Would it be advantageous to the defendant to use the same type of basal member?

A. No, he has a better basal member for his use, because it is a flat surface which won't dig into a soft platform. [148]

Q. I had not heard anything about that, so far. Do you think there is some disadvantage to the type of basal member that is on the plaintiff's device in actual use?

A. Well, I have not experienced any disadvantage, but naturally it has only a line contact where the cylindrical pipe engages the ground, where de-

(Testimony of William A. Doble.)

defendant's device has a flat surface which engages the ground and gives a far greater supporting area so it won't tend to imbed in a soft platform. Personally, I do not see any utility in plaintiff's structure. It is a hypothetical patent and the patent is addressed to a structure which has a second stable position, and that is the essence of the invention. The whole invention is addressed to that.

Q. Isn't the mobility just as important?

A. No, your Honor, for this reason: The only reason that defendant has a basal member which elevates the base from the ground is so he can get his truck under it in the same way that the Home platform had legs on it to lift it from the ground so they could run under it one of the lift trucks to move it.

Q. Would it be a fair statement to say that both devices have a definite element of stability that is their attribute, and in addition the plaintiff's device has more mobility?

A. Yes, that is true. That is a fair statement. Plaintiff's device has features which the defendant's device does not have.

The Court: I am sorry to have asked so many questions.

The Witness: It has been a pleasure, your Honor. [149]

The Court: Any further questions?

Mr. Lassagne: No further questions.

The Court: That is all.

Mr. Lassagne: The defendant rests.

(A recess was taken until two o'clock p.m.)

Afternoon Session, May 1, 1946, 2:00 p.m.

Mr. Beckley: Before proceeding, your Honor, I would like to move that the aluminum plate which was used in the demonstration just before the noon recess be introduced in evidence under the same stipulation as Plaintiff's Exhibit's 7 and 8 were introduced, that is a photograph be substituted.

The Lassagne: Satisfactory.

The Court: Very well.

(The photograph of the aluminum plate was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Boyken: I only want to ask the plaintiff a few questions.

WILLIAM JOSEPHIAN,

called in rebuttal on behalf of the plaintiff; previously sworn.

Direct Examination

Mr. Boyken: Q. Do you ever use a hand truck with rollers on the truck or wheels on the truck in order to move around your unit such as is in evidence here, Plaintiff's Exhibit 8? A. Yes.

Mr. Lassagne: We object, your Honor. Plaintiff's Exhibit 8 is not the device disclosed in the patent. The issue is confined to what is disclosed in the patent. Nowhere does the [151] patent say

(Testimony of William Josephian.)

anything about moving it with a hand truck. The commercial practice is irrelevant.

Mr. Boyken: We have been talking about it all through this trial. The commercial embodiment of the patented device is always relevant.

The Court: I think it came up here by some of your witnesses as to what was done.

Mr. Lassagne: It is relevant, of course, what the defendant is doing, because it is the defendant's acts that are charged with constituting an infringement, but whether or not the plaintiff is using——

The Court: Plaintiff described in the direct examination how the device was used. It might not, strictly speaking, be rebuttal. I will overrule the objection.

Mr. Boyken: Q. Do you understand the question?

The Witness: Yes.

Mr. Boyken: It was answered.

Q. Under what conditions do you use a hand truck for moving the unit?

A. The hand truck is used whenever there is a great distance to travel, such as on and off the truck in the plants where there are quite a few feet to move around. If there is any great distance to move we use a hand truck to move the unit with.

Q. Under what circumstances do you dispense with a hand truck and merely use the circular track at the bottom of the unit [152] for moving the unit?

A. As you——

(Testimony of William Josephian.)

The Court: He has already covered that.

Mr. Boyken: I have just one point in mind.

The Witness: As you see, there is a valve, outlet valve on this unit.

Q. You mean this valve I have my hand on?

A. Yes. That has to be connected to a copper pigtail at the customer's premises and occasionally, or quite often the unit is placed in the truck in such a way when they are ready to put it on the hand truck, to put it on the line, the valve is turned around or in the opposite direction. In that case the unit is brought into position for the connection where it makes to the pigtail, or if there is a short distance of several inches, up to a foot or two one way or the other, it can be done on the rolling ring.

Q. You also saw the device off the stand moved here in the courtroom by turning it around, did you not? I am talking about the device which is in evidence here, I believe, as one of the exhibits—this one? A. Yes.

Q. You can roll that around without the cylinder?

A. Yes. You don't need a truck for it.

Q. Under normal conditions what kind of a floor do you move these units over, is that an even floor or is it sometimes uneven?

A. Well, the floor is very unstandard, so to speak. You get all kinds of floors, you get them very [153] rough, rough concrete, rough wood up to smooth concrete floors, but hardly any two of our

(Testimony of William Josephian.)

jobs are alike. It may be smooth one month, it may be rough the next month.

Q. Do you have planked floors at times that you move the units over? A. Yes.

Q. Are these floors, let me say, out to the extent of three sixteenths of an inch?

A. Certainly; that is not great.

Q. That is not unusual?

A. That is not a great difference, no.

Q. Those would be normal conditions, would they not, in which these units are moved?

A. Yes.

Q. Floors of that kind? A. Yes.

Mr. Boyken: I have no further questions.

Mr. Lassagne: Neither have I.

Mr. Boyken: All right, Mr. Josephian.

HERBERT E. METCALF,

called in rebuttal on behalf of plaintiff; previously sworn.

Direct Examination

Mr. Beckley: Q. Your name is Herbert E. Metcalf? A. Yes.

Q. Where do you reside, Mr. Metcalf?

A. In Los Angeles.

Q. What is your address there?

A. 5959 Citrus Avenue.

Q. What is your occupation?

(Testimony of Herbert E. Metcalf.)

A. I am a patent attorney; [154] not an attorney at law.

Q. How long have you been a patent attorney?

A. Since 1931.

Q. Do you know the plaintiff in this case, Mr. William Josephian? A. I do.

Q. How long have you known him?

A. Since December, 1941.

Q. Would you tell the Court the occasion of your first meeting him?

A. I went over to Mr. Josephian's plant. At that time I was a member of the firm of Lippincott & Metcalf, who were prosecuting patent applications here in San Francisco, and I went over to Mr. Josephian's plant to see a device which he thought might be patentable.

Q. What occurred at that time and what device did Mr. Josephian show you?

A. Mr. Josephian showed me a device very similar to that which is shown in the patent drawing in the patent in suit, No. 2,317,064.

Q. What was the purpose of Mr. Josephian asking you to come to his plant?

A. He wanted me to see this device and do whatever experimenting I desired with it and to file a patent application on it.

Q. Did you do that? A. I did.

Q. Is that the application for the patent which ultimately issued as U. S. Patent No. 2,317,064, which is here in evidence as Plaintiff's Exhibit 1?

A. That is correct.

(Testimony of Herbert E. Metcalf.)

Q. At the time you went to Mr. Josephian's plant was there a model which was demonstrated to you?

A. I would hardly call [155] it a model. I think it was a device, the device itself as he had built it up, with the seven tanks on it.

Q. As shown in——

A. As shown in the patent drawing.

Q. Since that time have you also become familiar with the commercial embodiment of that device, an example of which is here in evidence as Plaintiff's Exhibit No. 8?

A. I have.

Q. Have you also become familiar with the device of the defendant which is in evidence as Plaintiff's Exhibit No. 7?

A. I have.

Q. What were the circumstances under which you became familiar with the defendant's device?

A. I desired to make measurements of the forces required to pull the unit over to the point where it would become upset and I wasn't able to make those measurements on Mr. Josephian's device in Mr. Josephian's factory. I was also able to find a device which I believed to be the defendant's device at the American Forge Company plant in Berkeley. The device which I saw was labelled "Rack No. 65" and had four oxygen tanks on which the numbers were S-84419, 52985, 77173, 3353, and they bore the name of the Stuart Oxygen Company.

Q. That device which you saw at the American Forge Company, was it the same device as is here

(Testimony of Herbert E. Metcalf.)

in evidence as Plaintiff's Exhibit 7 and which I now show you?

A. It was not the same device, but it was built, as far as I could see, in an identical manner. [156]

Q. During the course of these tests what measurements did you make on the device, the defendant's device and the plaintiff's, both?

A. I had a spring scale and I measured the forces which were required to overturn the device in both cases and under as nearly as I could the same general circumstances. When we arrived at the plant the particular unit was in a corner of a platform which was very rough.

Q. Are you speaking of the defendant's or the plaintiff's device?

A. I am speaking of the defendant's device. It was in a corner on a very rough wooden floor. The measurements did not appear to be easily made in the corner, so I personally rolled on its so-called depression this unit into the open portion of the platform, a distance of approximately eight feet, in the manner of tilting the device and rolling it easily on the edge of the depression. I then endeavored to find a level place, or at least, substantially level place on the platform. The boards were so uneven, however, that without using the measurement on a single board, tipping it so the device would *like* on a single board, the measurements were incorrect. There was one place where the device would just balance itself in the resting position in the manner that was shown here prior to the noon recess.

(Testimony of Herbert E. Metcalf.)

Q. Was that in the same manner as when the plaintiff's Exhibit No. 7 was resting upon the depression on the aluminum plate and the periphery of the base on the courtroom floor? [157]

A. That is correct. The device was then put on a board that was substantially level and pulls were made in the outward direction.

Q. Will you demonstrate that to the Court, how you made those measurements and where you applied these forces?

A. Yes. Before I do that, however, I would like to state why these measurements were made in this direction without going into the patent any more, which you are thoroughly familiar with, your Honor. The patent states that there will be a sudden force applied to move this from its central resting position. Then particularly on the plaintiff's device, there is another place where it can be easily moved from place to place by rolling. Then there is another place there that hasn't been brought out thoroughly heretofore. There is another place where another advantage, a sudden force is to be applied to this device before it will come way over to this point and then falls over. The object of the invention is two-fold; first, that the device shall be easily moved from place to place and, second, that it shall not fall over, completely over and injure the operator.

The patent states in two places that there shall be a first force to move it out of the resting position where it is square with the floor.

(Testimony of Herbert E. Metcalf.)

Q. How did you measure that force?

A. I used a spring scale and attached it to the center of this plate, or guard, or [158] whatever you wish to call it, on top of the device.

Q. In which direction did you make the pull?

A. I pulled outwardly because it is quite apparent that the thing which the inventor was trying to do was to make the device first easily movable and then stable. With respect to overthrow of the unit, whether it was stable as far as the inward direction is concerned is not particularly important. If you let go of it and it comes back, it comes back. If you push it back here it comes back. That is not the important thing. The important thing is will this device fall over and will it injure the man who is handling it.

Q. When you say you pulled outwardly, do you mean by that you pulled outwardly in a horizontal direction?

A. In a horizontal direction to find the force necessary first to move it into the position where it was easily movable and, second, to go beyond that point and find out the forces which were needed to be used in order to overturn the unit.

Q. Did you measure the force required to tip the unit to the various angles of tilt until it came to the position at which further tilting would upset it?

A. I did.

Q. Do you have the values which you measured?

A. I do.

Q. Did you make a chart of those values?

(Testimony of Herbert E. Metcalf.)

A. The chart was made under my direction and of the values that I obtained.

Mr. Beckley: I ask the chart which I hand the clerk be [159] marked for identification Plaintiff's Exhibit 11.

(The chart of values obtained in measurements of plaintiff's and defendant's devices was thereupon marked Plaintiff's Exhibit 11 for Identification.)

Mr. Beckley: Q. I hand you Plaintiff's Exhibit 11 for Identification. Is that the chart to which you have just testified? A. That is correct.

Q. Will you explain, Mr. Metcalf, what that chart shows?

A. On this chart there is plotted the forces required to completely overthrow the unit from its vertical position. On the two units which I measured the force required to start the motion outwardly started at around 40 pounds, about 45 pounds with the defendant's device taking slightly less force to displace it from the central position and on this chart the red line indicates the force required for the defendant device and the black line that required for the plaintiff's device. The force then decreased very rapidly as the angles of tilt increased until a low point was reached in both cases. In the defendant device this low point registered as close as we could measure it, as I could measure it, about 7 pounds. Then continuing, because here is the point where the seven pounds—

The Court: I wish the witness would just give

(Testimony of Herbert E. Metcalf.)

me the facts in connection with the matter because I know you gentlemen are going to argue the matter. Just give the result.

Mr. Beckley: All right. [160]

The Witness: Then the force rose to about 50 pounds in the defendant device and then decreased again until it went down to zero on the tip over. So there were two applications of force, one to pull it out of the central position and another large application of force to move it on over. In the plaintiff's device there are also two applications of force, one to pull it over into a position where the force becomes negative; in other words, it stays in this position. Then the force rose to about 25, 26 pounds, to pull it on over into the tip over position. The only difference between the two is that one, the defendant's device, would not remain in this position but would fall back into the central position, but it would not under any circumstances fall on over into the tip over position without the application of this much higher force.

Q. Mr. Metcalf, when you refer to a high point of force in the defendant unit, was the second application of force greater than the first?

A. It was by about four or five pounds, something like that.

The Court: The difference was about 45 to 50?

The Witness: A. Yes, the difference between the two devices, the tip over is about 25 to 50. Those figures in the patent with the larger device, that with the seven cylinders, the force required for

(Testimony of Herbert E. Metcalf.)

complete tip over is greater than the initial force, but in the smaller device in the plaintiff's device it is a little lower. [161]

Mr. Beckley: Q. Mr. Metcalf, did you hear the testimony of Mr. Doble which was given here this morning in the discussion which he gave of the definition of the word stable and the phrase which is used in the patent, "the second stable position"?

A. I did.

Q. As that word stable is used in the patent in suit what is the meaning, the intended meaning as used there and as defined in the patent?

A. In my opinion, it is used there to define the fact that this device, the plaintiff's device, is stable in the direction of overthrow; that is a position where a sudden increase in force is required in order for it to overthrow. Whether it stays in that position or whether it returns to central position I don't believe makes any difference.

Q. Is the term stable a relative term or is it a term which has but one and only one meaning?

A. In my experience, stability and the word stable depend wholly on the direction you wish something to be stable. Various machines are stable in certain ways and unstable in others. A certain device certainly does not have to be motionless or fixed to be stable. Automobiles, for example, are stable but can overturn, but you can drive them and they will still be stable. An airplane is stable in four different categories. [162]

(Testimony of Herbert E. Metcalf.)

[Printer's Note: Part of following question missing in copy.]

* * * though moving and turning?

A. That is correct. The rifling in a rifle barrel is made for the specific purpose of spinning the projectile out and it will be longitudinally stable. In other words, it will stay straight in the direction that it is going, irrespective of how it deviates in the air.

Q. What would be the effect without the rifling?

A. It would go end-over-end and would not go nearly as far as it normally would.

Q. The definition which you gave just a minute ago of "the second stable position," in respect to that can you find support in the patent for that particular definition which you gave?

A. If your Honor will permit me, there are two short quotations from the patent, page 2, line 11, it states:

"If the unit is then tilted by hand, for example, the tank can tilt into a second stable position as shown in Fig. 3, without the application of any great amount of force."

That is a relative term, because the whole device weighs, this particular device, close to a thousand pounds on the seven tank affair. 35 pounds is not a great amount of force to tilt a thousand-pound device. Then it states that "Under these conditions, a second and preferably greater application of force will be necessary in order to tilt the plant

(Testimony of Herbert E. Metcalf.)

laterally, so that the center of gravity" passes outside, etc., to [163] the tipover.

Q. Referring, Mr. Metcalf, to page 2 of the patent, column 1, line 59—incidentally, you drafted this application, did you not? A. I did, yes.

Q. And chose the word "stable" which is used in here? A. That is correct.

Q. In this paragraph to which I have referred which ends at the top of column 2 in line 3, is the intention there to indicate that that was the only way in which that advantageous result could be achieved?

A. Certainly not. It says that it can be attained in that manner and as has already been pointed out here, there are certain advantages in having a resting position in these two positions.

Q. But is it your understanding that those advantageous results could be obtained by other combinations of dimensions also?

A. That is correct, as long as there will be in the tilted position a force barrier which will prevent this device from tipping over on the operator.

Mr. Beckley: That is all. You may cross examine.

Cross Examination

Mr. Lassagne: Q. In Fig. 3 of the patent drawing, Mr. Metcalf, you caused to be made a diagram illustrating the center of gravity of the Josephian unit as lying between the vertical lines erected from the point of contact 17 and the point of contact 20?

A. Correct. [164]

(Testimony of Herbert E. Metcalf.)

Q. When the center of gravity is in that position the unit is stable as against outward movement?

A. Certainly.

Q. Isn't it also stable as against inward movement? A. Yes.

Q. Stable as against moving both ways?

A. Yes, sir.

Q. At the top of page 2, column 2, you say, "This simply means that the center of gravity is to lie between vertical lines erected from contacts 17 and 20." A. Correct.

Q. The "this" that you refer to—what was "this"?

A. In the first place, I am still describing the preferred movement illustrated and it is preferable to have the second stable position to be stable in both directions.

Q. You do not disclose in the patent diagram or teach there in any other way of obtaining the advantageous result, do you?

A. No, because the patent statute says you give one preferred form of an invention and that is all that is necessary.

Mr. Lassagne: That is all.

Mr. Beckley: Before closing, I would simply like to introduce into evidence the chart which has already been marked for identification Plaintiff's 11.

Mr. Lassagne: No objection.

The Court: Very well.

(The chart, Plaintiff's Exhibit 11 for Identification, was thereupon admitted in evidence.)

The Court: Any further questions of the witness?

Mr. Beckley: No further questions. Plaintiff rests. [165]

The Court: Do you claim without this last clause in that second claim that this is not an invention? Is that the point?

Mr. Lassagne: Yes, that the last clause must be read as a material limitation in the claim.

The Court: Without it, it does not disclose invention but it would be a progress in the art?

Mr. Lassagne: It would be skill in the art to put a bump on the bottom of the Western Steel device so you can wrestle it around more.

The Court: But with this last clause in it you do not claim that it is not an invention?

Mr. Lassagne: With the last clause in it, it is plainly not infringed. I think I can show you that.

The Court: No, with the last clause in it, is it invention?

Mr. Lassagne: We do not contest whether it is invention or not. I would be willing to admit that for the purpose of this case.

The Court: You say if that last clause was left off you would contest it; you would say it does not consist of invention?

Mr. Lassagne: It does not involve any invention whatsoever over the Western Pipe and Steel device, which it is admitted to have been in the prior art. Mr. Boyken by his questioning of Mr. Doble certainly implied—

The Court: That is, the secondary position is in your opinion the thing that make it an invention. If it were absent it would not be an invention. I wanted to get that quite clear.

Mr. Lassagne: Yes, that is my contention, that is my position. If that second stable position had not been recited, the Patent Office would never have granted a patent.

The Court: I will put it colloquially. The device would not fall over as long as there was a ring underneath it that was of such thickness and thinness as would either cause it to remain in an upright position, a secondary upright position, or that would cause it to teeter back to its original position?

Mr. Lassagne: You would get stability in the sense the device would not fall over.

The Court: You would get the same general results, would you not?

Mr. Lassagne: You would get the same degree of safety against overturning, yes.

The Court: That is what Mr. Boyken mentioned when I was thinking about that matter when he was talking. You would get the safety against overturning, stability against overturning. I have forgotten what the phrase was that he used.

Mr. Lassagne: But the phrase "stable position" as used in the patent specification and its claims is a different thing from stability in the general sense of stability against overturn.

The Court: Is it? That is the problem I am thinking about.

Mr. Lassagne: That is the problem, yes. [203]

The Court: Is there any particular virtue that the patent speaks of that results just in this position?

Mr. Lassagne: Yes.

The Court: What different virtue is there in that position so far as stability is concerned than in this position (indicating)?

Mr. Lassagne: So far as stability is concerned, none. But when you select that part of your range that the plaintiff has selected and claimed in this patent you combine safety against overturning with maximum ease in rolling the thing from place to place.

The Court: It may be the defendant's device is safer because it gets back to the upright position when it is tipped. That extended might be an improvement over this device.

Mr. Lassagne: It may be superior. We think it is, of course.

The Court: Now, isn't that a dangerous position for you to assume?

Mr. Lassagne: No.

The Court: Because then you would have to start from the point where you were improving on someone else's invention.

Mr. Lassagne: Not at all, because a superior device may be either an improvement on something else or may be something different than the other thing.

The Court: To the extent that it makes use of the other [204] man's claim, would it infringe even

though in the process of infringing it would improve?

Mr. Lassagne: Oh, if you come within the scope of a man's patent claims and then add something by way of improvement, unquestionably you infringe.

The Court: Frankly, I think that is what your difficulty is in this case. [205]

The Court: The object of the invention is in reality that when the device is maneuvered and moved that if it is tipped it will remain in a safe stable position. [210]

Mr. Lassagne: In a condition of safety.

The Court: Along comes Mr. Josephian and he devises this ring by which it is protected from falling over. Now, your client makes that ring a little narrower with the result that it does not tip over because it comes back to its original position. The object of the invention is not to perform some example with mechanics or mathematics. It is to accomplish a desired result, isn't it, and shouldn't we measure these bursts of genius we have in terms of what they are aimed at rather than to prove some mathematical formula or mechanical formula?

Mr. Lassagne: That would be true under a claim of a scope embracing that, but it is not a narrow view. Take in this case, because the patent is not for any and all means of accomplishing the object: To so interpret this patent would convert it into a patent for a result rather than a patent for a means of accomplishing a result.

The Court: You do not think that the main object of this invention was to create a sort of Leaning Tower of Pisa? I mean there is nothing to be accomplished by having a group of cylinders get themselves into this position, except it might have created some conjecture as to why that is, but the object is not to do that. The object is to get this thing in a stable position so it won't fall over. The way that is done is this. Surely the inventor did not have in mind all he was going to do was to bring about a situation where he could display to the [211] trade these devices set up in this position because that would not interest them. What possible profit could that bring about? It has been said he could not sell the object in that way. That would not be persuasive. No salesman could gain anything by saying, "My boss, Mr. Josephian, has got a set of cylinders that he is able to stand up on edge that way". That would not aid him at all. It seems to me the thing we have to consider is what is the object, what is the main thing you are aiming at? [212]

The Court: Would you like to argue this case some more or present a memorandum? I ask you that because I have a rather strong feeling in this case I ought to decide it in favor of the plaintiff.

Mr. Lassagne: I understand that.

The Court: I feel that way about it because looking at it from a rather common sense practical point of view the device your client made was built in the same way, uses the [218] same ring, and makes a little difference in the ring, and unquestionably

he wanted to use it for the accomplishment of the same objectives of stability and maneuverability. I am not impressed by the argument that this particular ring, when the defendant knew about plaintiff's patent and what he was using it for, was put there for the purpose of facilitating the use of a truck, to get it on the truck. That does not particularly impress me. Apparently this is not the kind of case where the Court is particularly required to go into the invention phase of the matter. As Mr. Boyken has said, it is not some revolutionary thing like the atomic bomb, but in its small way it appears to be a practicable and new way of handling these things. Your claim adopted that slight variation of the same plan, and it appeals to me that it is a case in which an injunction should be granted. I do not know whether there would be any purpose of any accounting. There isn't any sale of these devices. It is just a facility in the handling, the conduct of a man's business. Maybe an injunction might be sufficient. I do not know. You gentlemen may have more to say about that. But that is the way the case appeals to me and I think it is better to tell you that, so that if you think there is any more than you can add to it, I want you to have the opportunity to do that. It is better that I do that than just exhibit a frozen face to you and not tell you anything I am thinking about. [219]

The Court: I understand that argument all right, but, after all, Congress has said that judges have to decide these patent claims, these patent

cases, and all I can do is the best I can with them. I have said that in several decisions. I have to make a sort of informed guess in these matters and it appeals to me in this case, having in mind the point of law that you make there, that it is too narrow an [221] interpretation that you put on the effect of this claim. While it is true the defendant can only get the benefit of what he claims, when it comes to the matter of interpreting the meaning of what he has claimed, then I think on that phase of the matter your contention presents too narrow a view of the meaning of the claim. It seems to me that part of the claim only describes the effect rather than the object of the invention. Now, I may be wrong about that, but it seems to me that the claim should be interpreted in a case like this with at least sufficient liberality to give some reality to the invention rather than to make it a sort of illusory thing that anyone could change an "i" or cross a "t" there to get away from it. I think the evidence in this case and all the exhibits justify a more liberal interpretation of the claim. I agree with you that the inventor cannot get more than he claims. [222]

Monday, August 12, 1946

Mr. Boyken: This is a motion, your Honor, to vacate the approval of a supersedeas bond that was filed in this case, which bond was to stay the injunction. We also asked for an order fixing the terms upon which the injunction would be stayed.

I think your Honor will recall the circumstances of this patent case, involving a cluster of oxygen tanks, and the patent, as you will remember, was held to have been infringed, but the [1] Court declined to award any damages to the plaintiff. After that the defendant made a motion for permission to file a counter claim setting up declaratory relief, and that motion was denied. The morning we argued that motion, after your Honor denied it, there was some talk about the supersedeas bond and the staying of the injunction, and I suggested a \$5,000 bond. I am perfectly satisfied with that amount. I am not trying to increase it in any respect. However, the bond that was filed in order to stay this injunction reads to me as though it were just an ordinary cost bond, and your Honor did not allow any damages during the period of time up until the decree was entered, and it will be, of course, very difficult to prove any damages from the time of the decree of this Court until the Court of Appeals decides this case, maybe a year or more hence. The appeal has been proceeding in a rather leisurely manner. And so we are asking for some terms and conditions upon which that injunction may be stayed. Under the Federal Rules, which apply to District courts, the injunction may be stayed pending a determination of the appeal in the discretion of the Court, and any suitable terms may be interposed.

Now, these are the things that I think should be done: I want to submit them for your Honor's consideration. In the first place, the testimony

showed that there were a hundred of these devices in use, and when I suggested a \$5,000 bond I had in mind the number of devices that the defendant used [2] should remain at 100, and that they should not be increased, and I think it would be proper to limit the number of devices used by the defendant to the same amount that have always been used, pending the determination of this appeal.

Further I had in mind when I suggested that \$5,000 bond that it should be in the nature of, let us say, a penalty bond, if I can call it that. The way the bond reads, I do not think we could recover anything on the bond if the appeal was unsuccessful. That is the way the bond reads. What I am asking is that an order be fixed and the bond, in accordance with the order, should be in the nature of a penalty bond, that is to say, if the appeal is unsuccessful the plaintiff should be entitled to the \$5,000.

The Court: There is no authority for that kind of bond, is there?

Mr. Boyken: I was reasoning it this way: That bond, the way it reads now, seems to give the defendant, let us say, a free ride until after the appeal may be decided a year or so from now. If we were not entitled to any damages up until the time of the decree of this Court, either because they were too hard to prove or they were difficult to prove, or something of that kind—I do not know what your Honor's reasoning was on that, but we were satisfied with it—of course, we would not be able to prove any damages between the time the

decree was entered to the time the appeal was decided. [3]

The Court: I think the Court might fix some royalty, but I do not see how I could have the power to specify an amount of money without more, if the decreed were affirmed.

Mr. Boyken: Yes, your Honor, I think you could use your discretion and do anything you would like about that. The royalty arrangement would be satisfactory.

The Court: I felt there were no sales involved here, so the matter of damages would be a rather illusory thing. Of course, some reasonable amount could be fixed for the use of the idea, the patentable idea. In the event the decree were affirmed, of course, I think the plaintiff would be entitled to something for the use of the idea during the period of the appeal. I suggest—I do not know whether it would be agreeable to your opponent or not—that the wording might be, “In the event of the affirmance of the decree, the Court may fix some amount by way of the value of the use of the idea and by way of royalty during the period of appeal, not to exceed the sum of \$5,000.” The Court might fix that itself or have it determined by way of reference. I do not know if that is opposed by your opponent or not. That would seem to me, offhand, to be a fair way of protecting the rights of the Plaintiff during the appeal.

Mr. Boyken: The testimony showed that there were 100 devices of this kind and, of course, the testimony, as you will recall, showed that it resulted

in a saving to the defendant. [5] If the \$5,000 is adhered to, it is satisfactory to me, and with 100 devices, it would be in the nature of a royalty of \$50 each—not a royalty of so much per unit or damage per unit, but just as a fixed proposition it would \$50 apiece, which I do not think is excessive.

The Court: I do not think it would be wise to do that arbitrarily without hearing some testimony or having some record made as to the reasonableness of that. That could well be done, if the bond is up, upon the determination of the appeal, could it not?

Mr. Boyken: I would be satisfied with some kind of a hearing. If \$50 a unit per year is too high, I would be glad to listen to testimony in that respect.

The Court: Would you object to that procedure?

Mr. Lassagne: I think the entire thing is premature. The bond is up. If this were a case where profits continued to be made by the defendant out of the sale of the devices during the period the appeal was pending, and the decision were affirmed on appeal, we would then have a hearing as to what the plaintiff should recover on the bond. I think that is exactly what we should do here. The question of what is a reasonable royalty should be taken up after the appeal is decided.

The Court: I think Mr. Boyken's point is under the terms of the bond the Court might not be free to do that. [5]

Mr. Lassagne: I think the Court is free to do

that under the terms of the present bond. The terms of the present bond conform exactly to the provisions of the Rule 73(d), which states the conditions of a supersedeas bond in detail. It conforms exactly to that rule.

The Court: In what respect do you say it does not?

Mr. Boyken: Because that rule is intended to cover cases where the District Court has allowed damages or has allowed profits and damages, and then those damages need not be paid pending the appeal because of the bond. The difference between the usual case and this case is the Court has allowed no damages of any kind. Therefore there is no occasion for a supersedeas bond. We will have to go over it again. If the appeal is unsuccessful, we will go over the question whether or not the plaintiff is entitled to any damages between the time of the decree of this Court and the decision of the Court of Appeals. That is the distinction. There have been no damages awarded in this case. There is no money——

The Court: That is right.

Mr. Boyken: That is the difference between the usual case and this case. Therefore I am asking for some kind of terms staying this injunction, because, after all, the plaintiff is out as far as your Honor is concerned. There is no cost concerned because the bond covers cost. So I think there should be some royalty, or I suggest that this \$5,000 should [6] be considered a lump sum, and if the

defendant wants the injunction stayed, that should be the penalty for staying it.

The Court: Is there any real objection to the Court modifying the bond so it would provide in the event you lose on appeal then the Court might determine some reasonable amount not exceeding the amount of the bond to compensate for the use of the patent during the appeal?

Mr. Lassagne: I think the Court has that power, whether or not it applies to the present bond.

The Court: If you think it has, I do not think there would be any objection for your making that clear in the bond.

Mr. Lassagne: The bond is conditioned upon damages for delay, among other things. Recently—within the last two weeks, in fact—the patent statute governing action for infringing patents has been amended, or at least, both the houses of Congress have passed it and sent it to the White House for signature. It eliminates recovery for profits, for instance. It provides where infringement is found there will be general damages not less than a reasonable royalty. So that a reasonable royalty is merely one way of finding out what the damages are.

The Court: Suppose you lose the appeal, Mr. Lassagne. I do not want to put pessimistic ideas in your mind, but suppose you lose the appeal and your opponent comes here after. What relief would he be entitled to get under the bond? [7]

Mr. Lassagne: I think he would be entitled to a reasonable royalty during the period during which the appeal was pending.

The Court: Then there is no objection to making that clear in the bond if it is not clear now, is there?

Mr. Lassagne: No, but I think the reasonable royalty has to be set on the basis of testimony.

The Court: I think so, too. I do not think the Court should make any arbitrary award, but there should be some reasonable amount allowed by way of a royalty. I think if there is any doubt about it, that should be clarified in the bond, unless you are willing to stipulate that that is the interpretation of the bond.

Mr. Lassagne: May we not stipulate to that without going through the mechanics of vacating the bond, taking out a new bond, and all that sort of thing?

The Court: That is agreeable to the Court.

Mr. Boyken: I wrote Counsel a letter asking him to submit any order staying the injunction before the bond was filed, and he ignored that letter. There has been no response to that in any way.

Mr. Lassagne: This point was not raised in the letter, Mr. Boyken.

Mr. Boyken: I would prefer to submit an order, if Counsel approves of it, which would state the conditions upon [8] which this injunction is stayed.

The Court: You submit the order setting forth the conditions. Submit it to Mr. Lassagne for approval and I will sign it.

Mr. Boyken: I have an order here, but it treats

the \$5,000 as though it were a lump sum we were entitled to.

The Court: I would not do that. I think it would be fixed on the basis of some record made at the time, showing what would be a reasonable amount in the event the decree is affirmed.

Mr. Boyken: I will be glad to prepare such an order and submit it to Counsel.

The Court: Very well.

Mr. Lassagne: There is one further thing in Mr. Boyken's proposed order here on which I think we should get your Honor's thought. He asks that the supersedeas bond be effective for a period of only one year. It seems to me an appellee in a situation such as Mr. Boyken's client is has the right, if there is any undue delay, to ask the Appellate Court to increase or vacate the supersedeas bond.

The Court: I think you are right about that. I wouldn't want to determine that in advance.

Mr. Boyken: Yes, the \$5,000 was based upon one year, but if it is going to be a reasonable royalty, I will be glad to strike out that year and make it a reasonable royalty until [9] decision of the Court.

The Court: You prepare an order along those lines and submit it to Mr. Lassagne:

Mr. Boyken: Very well.

[Endorsed]: Filed Sept. 25, 1946. [9-a]

[Endorsed]: No. 11445. United States Circuit Court of Appeals for the Ninth Circuit. Stuart Oxygen Company, Ltd., a corporation. Appellant. vs. William Josephian. Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 16, 1946.

s/ PAUL P. O'BRIEN.

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11445

STUART OXYGEN CO., LTD.,

Appellant.

vs.

WILLIAM JOSEPHIAN,

Appellee.

APPELLANT'S STATEMENT OF POINTS
RELIED UPON ON APPEAL

The above-named appellant, pursuant to Rule 19, paragraph 6, of the rules of this Court, hereby states that the points on which appellant intends to rely on this appeal are as follows:

1. The District Court erred in interpreting the reference in the claims of the patent in suit to the device disclosed therein as having "a stable position" when tilted as applicable to defendant's device in which force must be exerted by the user to prevent the defendant's device from returning from tilted to upright position.

2. The District Court, in interpreting the claims of the patent in suit, erred in disregarding a clear definition found in the specification of said patent explaining the meaning of the expression "a stable position" as used in said claims.

3. The District Court erred in failing and refusing to conclude that the patent claims must be read in the light of the definition of a tilted "stable position" given in the patent specification, and that when so interpreted the claims specifically exclude defendant's device which will not stand tilted.

4. The District Court erred in finding identity of function in the patented structure and in the defendant's structure.

5. The District Court erred in finding substantial equivalency between the patented structure and the defendant's structure.

6. The District Court erred in failing and refusing to conclude that the making and using of the defendant's device in evidence was not an infringe-

ment of the claims in suit of plaintiff's patent, or any of them.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant-
Appellant.

ACKNOWLEDGEMENT OF SERVICE

Receipt of a copy of the foregoing Appellant's Statement of Points Relied upon on Appeal is hereby acknowledged this 16th day of October, 1946.

BOYKEN, MOHLER & BECK-
LEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Appellee.

[Endorsed]: Filed Oct. 16, 1946.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF
THE RECORD ON APPEAL TO BE
PRINTED AND OF EXHIBITS AND
DOCUMENTS TO BE INCLUDED IN A
BOOK OF EXHIBITS

Comes now the appellant Stuart Oxygen Company, Ltd., and, pursuant to Rule 19, paragraph 6, of the rules of this Court, hereby designates the

parts of the record on appeal to be printed, as follows:

	Transcript
Paper	Page
1. The Complaint	1
2. The Answer	3
3. Defendant's Request for Admissions (omitting photographs attached thereto.)	
4. The original Reporter's Transcript of the evidence and proceedings at the trial, transmitted to this Court, with the following omissions: (Here follows a list of omissions and deletions).	
5. Order for Judgment	7
6. Findings of Fact and Conclusions of Law ..	8
7. Final Judgment	12
8. Notice of Appeal	14
9. Designation of Contents of Record on Appeal	16
10. Order Staying Injunction and Fixing Terms of Stay Bond	24
11. Supersedeas Bond approved October 2nd, 1946	28
12. Order Extending Time for Docketing Appeal dated August 27, 1946	23
13. Order Extending Time to Docket dated September 27, 1946	27
14. Order for Transmission of Original Papers and Exhibits	31
15. Clerk's Certificate	34

Transcript

Paper

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16. Appellant's Designation of Parts of the Record on Appeal to be Printed and of Exhibits and Documents to be Included in a Book of Exhibits.
17. Appellant's Statement of Points Relied upon on Appeal.
18. Writ of Injunction.

And appellant further hereby designates the following exhibits and documents to be included in a Book of Exhibits:

Appellee's (Plaintiff's) Exhibits

Exhibit 1, Josephian patent No. 2,317,064.

Exhibit 2, Photograph*.

Exhibit 3A, Photograph*.

Exhibit 3B, Photograph*.

Exhibit 3C, Photograph*.

Exhibit 3D, Photograph*.

Exhibit 6, Drawing of defendant's device*.

Exhibits 7A and 7B, Photographs substituted for Exhibit 7*.

Exhibits 8A and 8B, Photographs substituted for Exhibit 8*.

Exhibit 10, Photograph of aluminum plate*.

Appellant's (Defendant's) Exhibits

Exhibits A-1, A-2 and A-3, Photographs referred to in Defendant's Request for Admission No. 2*.

*To be reproduced by photostatic process.

Appellant's (Defendants) Exhibits—(Cont.)

Exhibits B-1, B-2, B-3 and B-4, Photographs referred to in Defendant's Request for Admission No. 3*.

Exhibits C-1, C-2, C-3 and C-4, Photographs*.

Exhibit D-1, Photograph substituted for Exhibit D.¹*

Exhibit E, Blueprint.*

Exhibit F, Drawing of hand truck.*

NAYLOR and LASSAGNE,

/s/ THEODORE H. LASSAGNE,

Attorneys for Appellant.

ACKNOWLEDGEMENT OF SERVICE

Receipt of a copy of the foregoing Appellant's Designation of Parts of the Record on Appeal to be Printed and of Exhibits and Documents to be Included in a Book of Exhibits is acknowledged this 16th day of October, 1946.

BOYKEN, MOHLER & BECKLEY,

/s/ W. BRUCE BECKLEY,

Attorneys for Appellee.

*To be reproduced by photostatic process.

¹Attached to stipulation re "Substitution of Photographs for Physical Exhibits."

[Endorsed]: Filed Oct. 16, 1946.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER RE BOOK OF
EXHIBITS AND OTHER EXHIBITS

It is hereby stipulated, subject to the approval of the Court, that there shall be prepared ten (10) copies of the Book of Exhibits prepared in accordance with the designation of the parties, four copies of which shall be filed with the Clerk of this Court; three copies of which shall be delivered to counsel for appellant; and three copies of which shall be delivered to counsel for appellee.

It is further stipulated and agreed that the Court upon approval hereof and of the form of Order, enter an Order herein in the subtended form.

NAYLOR and LASSAGNE,
/s/ THEODORE H, LASSAGNE,
Attorneys for Appellant,
BOYKEN, MOHLER & BECK-
LEY,
/s/ A. W. BOYKEN,
/s/ W. BRUCE BECKLEY,
Attorneys for Appellee.

Dated: October 16, 1946.

ORDER

Whereas, the parties hereto have designated as part of the transcript of record on appeal the reproduction of the patent in suit, certain photographs, and other exhibits, and it having been represented that the reproduction of the other documentary exhibits of secondary importance would

be difficult and costly, and that an Order has been made for the transfer to this Court of all original exhibits admitted into evidence during the trial of this cause, where said exhibits may be inspected in original form;

It Is Hereby Ordered that the foregoing stipulation be, and it is hereby approved; and that as part of the transcript of record on appeal there shall be prepared at least ten (10) copies of the Book of Exhibits provided for in said stipulation, which shall be deemed a sufficient compliance with the rules of this Court respecting reproduction of exhibits.

It Is Further Hereby Ordered that original exhibits which have been received in evidence and transmitted to this Court but not reproduced in the Book of Exhibits may be referred to by counsel for all parties herein in briefs and in arguments, and all or portions of said exhibits may be inserted in the appendices of any of said briefs and shall thereupon be considered by this Court as though reproduced in the Book of Exhibits; and that plaintiff's original Exhibits 7, 8 and 10 and defendant's original Exhibit D, or substantial duplicates thereof if the originals are not available, shall be present in Court at the time of argument and may be referred to by the Court and counsel.

/s/ WILLIAM DENMAN,

United States Circuit Judge.

Dated: October 18, 1946.

[Endorsed]: Filed Oct. 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF
ADDITIONAL PORTIONS OF RECORD

Appellee designates the following portions of the Transcript of Testimony in the District Court for inclusion in the record on appeal in addition to the matters designated by the appellant:

Page 193, line 13, to and including page 194, line 19 to the word "patent".

Page 203, line 4, to and including page 205, line 7.

Page 210, line 23, to and including page 212, line 9.

Page 218, line 18, to and including page 219, line 25.

Page 221, line 19, to and including page 222, line 15.

Appellee further designates that Plaintiff's Exhibit 9 shall be included and printed in full in the Book of Exhibits.

BOYKEN, MOHLER & BECK-
LEY,

/s/ A. W. BOYKEN,

/s/ W. BRUCE BECKLEY,

Attorneys for Appellee.

Dated: October 17, 1946.

Receipt of a copy of the foregoing "Designation by Appellee of Additional Portions of Record" is acknowledged this 17th day of October, 1946.

NAYLOR and LASSAGNE.

[Endorsed]: Filed Oct. 18, 1946.

In the United States District Court for the Northern
District of California, Southern Division

Civil Action No. 25286-G

Suit for Infringement of

Patent No. 2,317,064

WILLIAM JOSEPHIAN,

Plaintiff,

vs.

STUART OXYGEN CO., LTD.,

Defendant.

SUBSTITUTION OF PHOTOGRAPHS
FOR PHYSICAL EXHIBITS

Pursuant to stipulation and subject to the Court's approval, the attached photographs are substituted herein for the physical exhibits introduced in evidence during the trial of the cause:

Photographs 7A and 7B substituted for Plaintiff's Exhibit 7.

Photographs 8A and 8B substituted for Plaintiff's Exhibit 8.

Photograph D-1 substituted for Defendant's Exhibit D.

The aluminum plate appearing in each of the photographs and upon which the physical exhibits are seen to be resting was introduced in evidence as Plaintiff's Exhibit 10. The photographs shall likewise be considered as a similar substitute for that exhibit.

It is further agreed that original Plaintiff's Exhibits 7, 8 and 10 and Defendant's Exhibit D may be withdrawn.

BOYKEN, MOHLER & BECK-
LEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Plaintiff.

NAYLOR and LASSAGNE,
/s/ THEODORE H. LASSAGNE,
Attorneys for Defendant.

Dated: May 13, 1946.

Approved:

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed U.S.D.C. May 13, 1946.

[Endorsed]: Filed U.S.C.C.A. Oct. 17, 1946.

No. 11,445

United States
Circuit Court of Appeals
For the Ninth Circuit

STUART OXYGEN COMPANY, LTD.,
a corporation,

Appellant,

vs.

WILLIAM JOSEPHIAN,

Appellee.

Brief on Behalf of Appellant

NAYLOR AND LASSAGNE

THEODORE H. LASSAGNE

Russ Building,
San Francisco, California,

Attorneys for Defendant-Appellant.

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United States
Circuit Court of Appeals
For the Ninth Circuit

STUART OXYGEN COMPANY, LTD.,
a corporation,

Appellant,

VS.

WILLIAM JOSEPHIAN,

Appellee.

Brief on Behalf of Appellant

This is an appeal from a final judgment of the United States District Court for the Northern District of California, Southern Division, adjudging that Letters Patent No. 2,317,064 issued April 20th, 1943 are good and valid in law and that Stuart Oxygen Company, Ltd. has infringed said Letters Patent by making and using certain devices introduced in evidence.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court of the United States in this action is based upon the following statutory provision:

“The district courts shall have original jurisdiction as follows:

* * * * *

“SEVENTH: Of all suits at law or in equity arising under the patent, the copyright, and the trademark laws.”

Judicial Code, Section 24;

United States Code, Title 28, Section 41.

The Complaint in this action (I, 2-3) alleges, in paragraph III thereof, that the jurisdiction is based upon the patent laws of the United States, and the Answer (I, 4-7) admits, in paragraph III, the truth of this allegation.

The appellate jurisdiction of the Circuit Court of Appeals in this action is based upon the following statutory provision:

“The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions:

“FIRST: In the district courts in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.”

Judicial Code, Section 128;

United States Code, Title 28, Section 225.

The United States District Court for the Northern District of California, Southern Division, entered in this action Findings of Fact and Conclusions of Law (I, 10-14) and a Final Judgment (I, 15-16) on May 23rd, 1946.

This judgment was a final decision in the District Court which may be reviewed by appeal in this court in accordance with the jurisdictional statute last above quoted, subject only to the provisions of the following statute:

“No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.”

United States Code, Title 28, Section 230.

In accordance with this statute and the Rules of Civil Procedure of the District Courts of the United States, Rule 73, appellant within said three months; to-wit: on July 19, 1946, filed with the District Court a Notice of Appeal (I, 17-18).

STATEMENT OF THE CASE

The Complaint (I, 2-3) in this action charges infringement of patent No. 2,317,064 (II, 197-200) issued April 20th, 1943 to William Josephian, entitled “Tank Truck.” The Answer (I, 4-7) denies that the patent was “duly and legally issued” or was “for an invention,” and also denies infringement. A Request for Admission of Facts (I, 7-9) served and filed by defendant* was unanswered by plaintiff, and the matters of which an admission was requested are deemed admitted (Rule 36a, *Federal Rules of Civil Procedure*). These admissions established the public use in this country, more than one year prior to the

*Herein the parties will be referred to as plaintiff and defendant, as in the District Court.

filing of the application for the patent in suit, of certain devices, photographs of which were admitted in evidence as defendant's exhibits and which will be described hereinafter.

The device of the patent in suit is, fundamentally, a plate shaped, in general, like an ordinary saucer, which is adapted to have secured to it seven gas cylinders of the type in which oxygen is usually marketed. But no patent was asked for or granted claiming such an obvious use of the familiar saucer form. Instead, the claims asserted by Josephian and allowed by the Patent Office were restricted to a device in which the saucer-like base was proportioned in a specifically defined way to secure particular results which will be best understood when the history of the patented device is considered.

For many years oxygen was delivered from manufacturers to purchasers in cylinders which were handled one at a time in making deliveries (I, 44-45). It was customary, in such handling, to tip these cylinders to an approximately balanced position and roll them on an edge (I, 67).

Long before plaintiff entered the field with his device, efforts to avoid individual handling of such cylinders had resulted in the mounting of a large number of cylinders on a truck or trailer left at the premises of the user, as illustrated in Defendant's Exhibits C-1 to C-4 (II, 238-241); the mounting of a group of ten cylinders in a frame, raised above the floor so that an ordinary lift truck could get under and lift the assembly, as illustrated in Defendant's Exhibits A-1 to A-3 (II, 231-233); and the mounting of groups of four or five cylinders on a flat circular plate secured thereto for transportation as a unit, as

shown in Defendant's Exhibits B-1 to B-4 (II, 234-237). These latter units could be moved short distances by an operator in the same way as the defendant's units are moved (I, 137), but were designed also to be moved by crane in transporting or conveying them (I, 137) just as defendant's units are moved by hand trucks (I, 88-90) when they are to be moved other than very short distances.

Plaintiff is engaged in manufacturing and selling oxygen (I, 32) in competition with defendant and others. Acting under the spur of severe competition, he made a lengthy investigation of the devices which were being used by others for gas delivery before he made the device of the patent in suit (I, 47-48). With knowledge of them, he did not claim as inventive the mere substitution of a saucer-like base plate for the flat circular plate of the prior art device of Defendant's Exhibits B-1 to B-4 (II, 234-237). He limited every one of his claims (II, 200) to a structure in which the base and rim of the saucer-shaped base plate were critically proportioned to each other so as to give the structure "a second stable position" when tilted. This made possible two results: i.e.,

1. Balancing the unit in tilted position for ease of rolling; and
2. Prevention of overturning upon tipping beyond balanced position.

Josephian testified that, after inspecting others' devices, he "hit upon the idea of *balancing* the cylinders on a plate" (I, 48); that "only when you get into extremely heavy weight does it become important" * * * "to have the balance line right on the center track" (I, 71); that he

ordered "a half dozen rings and made them up and picked out what I thought was the best of different diameters" in making his device (I, 74); and that *the fact that the unit can move as far as the tilted stable position in which it stands free makes it possible to get the unit tilted to the position where the center of gravity is right over the rolling edge* (I, 75).

Plaintiff's expert likewise admitted that "there are certain advantages in having a resting position in these two positions" and that "it is preferable to have the second stable position to be stable in both directions" (I, 168-169).

The patent discloses only a seven cylinder unit although Josephian had built a four cylinder unit at the same time (I, 49-50) as shown in Plaintiff's Exhibits 3-A to 3-D (II, 202-205). The seven cylinder unit was disclosed, according to plaintiff's own statement, because "seven cylinders had more weight and for that reason would be more effective in demonstrating how *balance* could be achieved" (I, 52).

Claim 2 (II, 200), which is the broadest of the claims in suit, reads, in full, as follows:

"A truck for handling a plurality of cylindrical tanks comprising a base plate, means for holding a plurality of cylindrical tanks in fixed upright position on the top of said plate, and a basal member fastened to the bottom of said plate and having a circular periphery centrally located with respect to the periphery of said plate to support said truck in upright stable position, *said truck having a second stable position when tilted to rest on both of said peripheries only.*"

The specification of the patent in suit defines what is meant by "a second stable position" at page 2, column 1, line 59, to column 2, line 3, thereof (II, 200), in the following terms:

"In any event, the advantageous result of my invention can be accomplished by so designing the lower plate and its attached track, so that there will be a second stable position, such as that shown in Fig. 3 after the tank has been tilted. This simply means that the center of gravity 15 is to lie between vertical lines erected from contacts 7 and 20."

The defendant's gas cylinder holder, Plaintiff's Exhibits 7-A and 7-B (II, 207-208) bears a superficial resemblance to the device of the patent in suit (II, 198), in that a depression in the inner portion of the base plate gives that plate a saucer-like shape, but the relationship of the inner depression to the diameter of the entire plate is such that it has no "second stable position" but always returns to a vertical stable position if tilted and released. (I, 124-126). This is true because it is impossible for the center of gravity to move outwardly beyond, or even as far as, the point of contact of the inner portion of the base with the floor (I, 132 and 146-147). This is critical in determining that defendant's device will not have a "second stable position" and is not a mere matter of degree (I, 147). Because of this difference, defendant's units cannot be balanced for rolling upon the edge of the depression in the base plate.

The critical nature of the proportions in question was shown by plaintiff's demonstration (I, 148-149) that a very substantial increase in the thickness of the central portion

of the basal member of defendant's device was necessary to cause it to stand free in tilted position. The necessary increase in thickness was 25% of the actual thickness of the entire portion of the member; being $3/16$ of an inch (I, 149) in a member actually $3/4$ of an inch thick, as shown by Defendant's Exhibit E (II, 243).

Plaintiff, at the trial, attempted to mislead the Court with respect to the actual proportioning of the parts of this basal member, by introducing in evidence a grossly misrepresentative drawing purporting to show defendant's device (Plaintiff's Exhibit 6, II, 206), in which the thickness of the central portion of the basal member was shown by defendant, over strenuous objection by plaintiff's counsel, to be exaggerated by $58\frac{1}{2}\%$ (I, 132-134). This drawing was admitted by the Court, under the impression that Josephian had had it made under his own direction and vouched for it as a correct drawing (I, 63-64), but Josephian, on cross-examination, disavowed it and stated that his counsel had taken care of its preparation (I, 78).

The District Judge, in deciding the case, took the position that the expression "stable position" as used in the claims was not limited by the definition of that language contained in the specification (I, 176).

QUESTIONS PRESENTED

Two questions are presented by the present case:

1. Is the expression "a second stable position" as used in the patent claims to be construed as limited by the definition thereof contained in the patent specification; and

2. Does the defendant's device have "a second stable position" within the meaning of that expression construed as determined by the decision on the first question.

SPECIFICATION OF ERRORS

The errors relied upon and which will be urged are as follows:

1. The District Court erred in finding that the defendant's device in evidence as Plaintiff's Exhibit 7, illustrated in Plaintiff's Exhibits 7-A and 7-B (II, 207-208) has a "second stable position" when resting simultaneously on the edge of the base plate and on the circular depression formed in said base plate; as set forth in Finding of Fact No. 12 (I, 12).

2. The District Court erred in concluding that the phrase "stable position," as used in the Letters Patent in suit refers to any position occupied by a device of the kind disclosed, in which a material increase in force is required, to cause further motion of said truck in the direction of upset, as set forth in Conclusion of Law No. 4 (II, 13); instead of concluding that said phrase is applicable only to a position in which the center of gravity of the truck is located as defined in the specification of the patent at page 2, column 1, line 59, to column 2, line 3 (II, 200).

3. The District Court erred in finding that the circular depression in the bottom of the base plate of Plaintiff's Exhibit 7, for which has been substituted herein photographic Plaintiff's Exhibits 7-A and 7-B (II, 207-

208) is the substantial equivalent of and performs the same function as the circular track disclosed in the patent in suit, as set forth in Finding of Fact No. 14 (I, 12).

4. The District Court erred in concluding that defendant has infringed claims 1, 2, 3 and 4 of the patent in suit, as set forth in Conclusion of Law No. 5 (I, 13).

5. The District Court erred in concluding that plaintiff is entitled to an injunction as set forth in Conclusion of Law No. 6 (I, 13).

SUMMARY OF ARGUMENT

1. The Josephian patent No. 2,317,064 describes and claims a gas cylinder holder which Josephian knew to be nothing more than an improvement on previously used devices for accomplishing the same general result in substantially the same way. The asserted improvement consisted of proportioning the parts of a circular base member, previously known and used, so as to make it possible to exactly balance the unit for rolling from place to place, and also to arrest it in a "second stable position" in the event of tilting beyond the position of exact balance.

2. What was meant by the expression "second stable position" was explicitly defined in the specification of the patent and each of the claims was explicitly limited to a device having such a "second stable position." The language of the claims must be construed in accordance with the explicit definition of such language contained in the specification, and it cannot be given a contrary colloquial meaning attributed to it by an expert witness in an effort to apply it to defendant's device.

3. Josephian emphasized in his patent and his testimony, and that of his expert witness, that the patented construction had added utility and distinctive qualities by virtue of the possibility of exactly balancing it in tilted position for rolling from place to place. Only a device capable of such exact balance could have a "second stable position" as recited in the claims.

4. The doctrine of equivalents cannot be invoked to hold as an infringement defendant's device, which lacks "a second stable position" and the added utility and distinctive qualities which it imports, when, as here, the "second stable position" is explicitly brought into the claims.

ARGUMENT

THE QUESTION PRESENTED IS ONE OF CLAIM INTERPRETATION

Josephian was no pioneer in the art to which the patent in suit relates. Josephian's patent discloses and defines in its claims only a gas cylinder holder which is capable of being tilted to "a second stable position" in which it will stand free when released.

The District Judge in deciding the present case held that the defendant's gas cylinder holder illustrated in photographic Plaintiff's Exhibits 7-A and 7-B (II, 207-208) had "a second stable position" within the meaning of that expression as used in the claims of the patent in suit, even though defendant's device when tilted to such a so-called "stable position" and released would not remain there but would immediately rock back to vertical position.

In taking this position, the Court reasoned that “you would get the same general result” * * * “you would get safety against overturning, stability against overturning” (I, 171), and rejected defendant’s contention that the phrase “stable position” as used in the patent specification and its claims meant a different thing from stability in the general sense of stability against overturn (I, 171). In this the Court erred.

The present appeal thus presents a pure question of interpretation of patent claims. The relevant considerations in the determination of this question are, primarily: what meaning did the patentee ascribe in his patent specification to the claim phraseology in dispute; and secondarily, does the patented construction have added utility and distinctive qualities by virtue of its incorporation of the claimed feature described by the language in controversy. Other considerations such as the fact that the defendant’s employees were familiar with plaintiff’s commercial devices and the fact that defendant knew of the patent in suit before it designed the devices alleged to infringe are completely irrelevant to the determination of this question, because defendant is relying upon plaintiff’s explicit exclusion from the scope of the patent claims, of a device constructed and operating in the manner of that here alleged to be an infringement.

In other words, the defendant took the patent claims, interpreted them in the light of the specification as securing to the patentee all to which he was entitled when they were interpreted in the light of the definition of their phraseology contained in the specification, and being thus apprised by the claims of what was still open to it and the

rest of the public, designed the allegedly infringing device in such a way as to completely respect plaintiff's proper patent rights.

Defendant in proceeding in this manner was in complete accordance with both the spirit and the letter of the entire current of authority in the Supreme Court of the United States as expressed in *McClain v. Ortmyer*, 141 U.S. 419, in which it was said:

“The object of the patent law in requiring the patentee to ‘particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery,’ is not only to secure to him all to which he is entitled, but *to apprise the public of what is still open to them. The claim is the measure of his right to relief.*”

The essential public interest in determining what is *excluded* by patent claims as well as what is included by them has been frequently emphasized by the circuit courts of appeal including the Circuit Court of Appeals for the Ninth Circuit.

American Roll Gold Leaf Co. v. Coe Co., 212 Fed. 720 (C.C.A. 1):

“The public have a right to rely upon the language of the claims in determining how far the patentee's rights go.”

Fulton v. Powers, 263 Fed. 578 (C.C.A. 2):

“One may appropriate many of the ideas or concepts projected by specification and drawing, but it is the claim that measures both the patented invention and the infringement thereof. This rule obtains whether the patent be properly spoken of as great or small, primary or secondary.”

Wilson & Willard Mfg. Co. v. Union Tool Co.,
249 Fed. 729 (C.C.A. 9):

“It is thoroughly well established that the patentee is limited to his claim, and the patent is no broader than the claims, and if the language of the claims of the patent is clear and distinct, the patentee is bound by the language he has employed.”

The issue in this case, thus, is whether the defendant's gas cylinder holder has “a second stable position” within the meaning of that expression as used in claim 2 of the patent in suit (II, 200), and as stated in other words in claim 1 of the patent in suit. Claims 3 and 4, which are the only other claims held infringed (I, 13), incorporate by reference everything recited in claim 2.

Because of critical differences in proportioning of the parts of the base members of plaintiff's and defendant's devices, the plaintiff's device is in equilibrium when it is standing in the tilted position in which it is illustrated in Figure 3 of the patent drawing (II, 198) and as shown in photographic Plaintiff's Exhibit 3-C (II, 204); whereas, the defendant's device when similarly tilted will not stand in tilted position as will the defendant's device shown in the photograph just referred to, but will always return to the vertical position in which it is shown in the photographic Plaintiff's Exhibit 7-B (II, 208). This is true because in the patented device, tilting to the position illustrated in Figure 3 of the patent drawing (II, 198) causes the center of gravity, designated 15 in the patent drawing, to move outwardly from the position directly over the center of the base portion 11 in which it is shown in Figure 1 of the patent drawing to a position between

vertical lines erected from the point of contact 17 of the basal portion 11 with the floor and the point of contact 20 of the basal portion 8 with the floor. This is clearly described in the patent specification at page 2, column 1, line 59, to column 2, line 3 (II, 200).

On the other hand, in the defendant's device it is impossible for the center of gravity to move outwardly beyond, or even as far as, the point of contact of the inner portion of the base with the floor (I, 132 and 146-147). This is critical in determining that defendant's device will not have a "second stable position" and is not a mere matter of degree (I, 147).

**The Expression "A Second Stable Position" Must Be Construed
as It Is Defined in the Patent Specification**

It is a cardinal rule of patent claim interpretation that an uncommon word or expression in a claim is to be construed in the light of the description rather than in the light of the dictionary or of expert testimony (*Walker on Patents*, Deller's Edition, Section 271, page 1264).

The leading decision on this point is that of *Advance Rumley Co. v. John Lauson Mfg. Co.*, 275 Fed. 249 (C.C.A. 7) in which the Court said:

"This court has frequently and consistently recognized the patentee's right to be his own lexicographer, and in the present suit, regardless of the ordinary or technical meaning of the words 'throttling-valve,' we will unhesitatingly accept another definition if ascertainable from the patent, if by doing so we can give better or more accurate effect to this or other claims."

Similarly, in *Robert Esnault-Pelterie v. Chance Vought Corporation*, 56 Fed. (2d) 393 (Affirmed, 66 Fed. (2d) 474) (C.C.A. 2), the Court said:

“It is the meaning which the patentee gave to the words which is apparent from the patent itself and not the meaning according to the dictionary or any writers at the time which governs. (Cases cited.)”

The plaintiff in his patent clearly defined what is meant by the expression “a second stable position” as used in the patent claims, saying in his patent specification at page 2, column 1, starting at line 59,

“In any event, the advantageous result of my invention can be accomplished by so designing the lower plate and its attached track, so that there will be a *second stable position*, such as that shown in Fig. 3 after the tank has been tilted. This simply means that the center of gravity 15 is to lie between vertical lines erected from contacts 17* and 20.”

Plaintiff’s expert, Herbert E. Metcalf, on cross-examination attempted to avoid the force of this definition contained in the patent specification by contending that it applied only to the preferred form of the invention (I, 169), but it is clear that this is the only place in the patent in which the expression “a second stable position” is found and in which a definite meaning is attributed to it. Under these circumstances, it is clear that even though the testimony to the effect that this description applies solely to the preferred form of the invention be taken as wholly true, the fact that the same expression as is defined in

*The numeral 7 as used at this point is a typographical error and should be read as 17 (I, 142).

this portion of the specification is used in claim 2 of the patent requires that the claim be limited to the preferred form. Such was the holding of the Circuit Court of Appeals for the Sixth Circuit in *Jones et al. v. Sykes Metal Lath & Roofing Co.*, 254 Fed. 91 (C.C.A. 6), in which the syllabus reads:

“A patentee may supply his own dictionary; so a claim being for roll with notches staggered, as specified, and the word ‘staggered’ being found, in the specification, only in the sentence stating the preferred form, the claim will be limited to such form.”

**The “Second Stable Position” of the Patent Specification
Gives the Patented Device Special Advantages**

A further rule of claim interpretation applicable to the present case is that where a particular claimed feature gives the device certain additional utility or distinctive qualities, the claims must be limited to cover only devices embodying such a claimed feature.

A painstaking review of the authorities supporting this rule is contained in the opinion of Circuit Judge Denison in the case of *D’Arcy Spring Co. v. Marshall Ventilated Mattress Co.*, 259 Fed. 236 (C.C.A. 6), in which it is said:

“Considering the scope of the actual invention and of claims which might well have been formulated, there would be little difficulty in finding in defendants’ second form the necessary equivalency upon which to predicate infringement, if it were not for the expressly stated requirement about the relative positions of the strips. We assume, as hereafter stated, that this requirement was not inserted under such circumstances as to estop the patentee from asserting his present theory. It follows that the case is

to be treated as one of voluntary and unnecessary limitation.”

* * * * *

“In *Keystone Co. v. Phoenix Co.*, 95 U.S. 274, 24 L.Ed. 344, the claim called for ‘wide and thin drilled eyebars * * * applied on edge.’ Defendant used round bars, flattened at the ends where eyes were drilled, and (apparently) placed on edge. Though the two forms were equivalent enough in a general way, yet since it appeared that the ‘wide and thin’ form had thereby additional utility, the claim was limited to the form specified.

“In *White v. Dunbar*, 119 U.S. 47, 7 Sup. Ct. 72, 30 L.Ed. 303, the claim specified a lining of textile fabric; defendant used a lining of paper. The main object of the invention was accomplished just as well by the paper as by the cloth; but the court, in its often-cited ‘nose of wax’ opinion, held that they were not equivalents. The principle seems to be that since cloth and paper are not always equivalent and since cloth has distinctive qualities which the patentee might have considered important, he would not be allowed to escape his express declaration that he claimed cloth only. This court has often applied the same rule.”

* * * * *

“From a review of these and other familiar cases, we think it is safe to deduce the proposition that where the claim defines an element in terms of its form, material, location or function, thereby apparently creating an express limitation, where that limitation pertains to the inventive step rather than to its mere environment, and where it imports a substantial function which the patentee considered of importance to his invention, the court cannot be per-

mitted to say that other forms, which the inventor thus declared not equivalent to what he claimed as his invention, are nevertheless to be treated as equivalent, even though the court may conclude that his actual invention was of a scope which would have permitted the broader equivalency."

* * * * *

"Plaintiff urges that this limitation pertains not to a mechanical element but only to a matter of location, and, hence, that a more liberal rule of equivalency should be applied. We cannot see that it is doctrinally important whether the element said to be missing in defendants' structure is a mechanical element or any other kind of an element."

That the plaintiff Josephian considered the "second stable position" as the same as defined in the specification to be an important feature of his invention, giving his device additional utility and distinctive characteristics, is clear from both his own testimony and that of his expert, Herbert E. Metcalf. It was admitted that the fact that the patented unit can move as far as the defined "second stable position" makes it possible to get the unit tilted to the position where the center of gravity is exactly over the rolling edge, and the unit is thus exactly balanced for rolling (I, 75), and that it becomes important to have the balance line right on the center track when extremely heavy weights such as the seven-cylinder unit disclosed in the patent are to be moved (I, 71). Metcalf in his testimony agreed that there are certain advantages in having a resting position in these two positions, meaning in having the unit so arranged as to be capable of standing at rest either in the vertical position or in the stable

tilted position (I, 168), and again on cross examination stated that "it is preferable to have the second stable position to be stable in both directions" (I, 169).

Thus it appears in the language of Judge Denison that the second stable position of the claims of the present patent imports "a substantial function which the patentee considered of importance to his invention," and that under these circumstances "the Court cannot be permitted to say that other forms which the inventor *thus declared not equivalent to what he claimed as his invention* are nevertheless to be treated as equivalent."

**THE DEFENDANT'S DEVICE HAS NO SECOND STABLE POSITION
AND LACKS THE ADVANTAGES IMPORTED THEREBY**

Notwithstanding efforts on behalf of plaintiff to confuse and mislead the Court with respect to the primary issue of this case, it was clearly established that the defendant's unit has no "second stable position," because its basal member is proportioned so that the center of gravity cannot be moved to a position between two points of contact of the basal member with the floor upon tilting of the unit. This was physically demonstrated to the Court and explained in detail by defendant's expert, Wm. A. Doble (I, 124-126).

Plaintiff obtained the introduction in evidence of a grossly misrepresentative drawing identified as Plaintiff's Exhibit 6 (II, 206) purporting to show the "Defendant's Tank Truck" standing stably in tilted position in Figure 3 thereof, and showing a purported detail of the defendant's basal member in Figure 4 thereof. This drawing was admitted by the Court under the impression that the

witness Josephian vouched for it as a correct drawing (I, 63-64), but Josephian on cross examination disavowed it and stated that his counsel had taken care of its preparation (I, 78). Defendant's attempts to show the misleading character of this drawing were strenuously resisted (I, 132-135), but in spite of such resistance, Mr. Doble, the defendant's expert, was able to show the Court that Figure 4 of Plaintiff's Exhibit 6 (II, 206) showed a $58\frac{1}{2}\%$ exaggeration of the proportions of defendant's base plate.

Later the plaintiff, attempting to demonstrate similarity between plaintiff's and defendant's devices, emphasized that an increase of $\frac{3}{16}$ of an inch in the depth of the depression in defendant's basal member would cause the defendant's device to come to rest in a stable tilted position. This was demonstrated by placing defendant's device near an edge of aluminum plate $\frac{3}{16}$ of an inch thick and tipping it over the edge of the plate until the edge of the basal member came into contact with the floor.

The true effect of this demonstration, however, was to demonstrate the critical nature of the proportions of the basal member in relation to the present invention, and that defendant in adopting the proportions it did avoided any close approach to the proportions made critical by the patent claim. For while $\frac{3}{16}$ of an inch seems superficially to be a small dimension, it must be remembered that this amount was added to a member actually only $\frac{3}{4}$ of an inch thick to begin with, making the actual increase in effective thickness a matter of 25% of the total thickness of the member.

In view of the foregoing authorities and evidence, it is therefore submitted that defendant in designing and adopt-

ing the structure charged to infringe the patent chose to forego the special utility and advantages of the patented device imported by the provision for "a second stable position." By designing its device so that it had no second stable position, defendant eliminated the possibility of tilting its device to a position in which the center of gravity was balanced over the rolling edge in such a way as to permit extremely heavy weights to be easily moved by one man. Defendant's device is not capable of being so balanced. Furthermore, in so far as the defendant's device achieves the general result of reducing the possibility of accidental overturning, it does so by totally different mode of operation than does the patented device, returning as it does always to its original vertical position instead of coming to rest in "a second stable position" in which it stands tilted in the manner of the patented device.

Superficial similarities of appearance cannot outweigh such clear evidence of lack of mechanical equivalency as is supplied by these differences in result achieved and in mode of operation.

The final judgment of the District Court should therefore be reversed and the Court directed to dismiss the Bill of Complaint on the ground that the patent in suit is not infringed by the defendant's structure.

CONCLUSION

Defendant submits that the appealed judgment should be reversed.

Claims 1, 2, 3 and 4 of the Josephian patent No. 2,317,064 are not infringed by the manufacture and use of the defendant's devices illustrated in photographic Plaintiff's Exhibits 7-A and 7-B (II, 207-208) for the reasons set forth herein.

Respectfully submitted,

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Dated at San Francisco, California,
February 27, 1947.

No. 11,445

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STUART OXYGEN Co., LTD.,

Appellant,

VS.

WILLIAM JOSEPHIAN,

Appellee.

BRIEF FOR APPELLEE.

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FILED

MAR 29 1947

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IN THE
United States Circuit Court of Appeals
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STUART OXYGEN Co., LTD.,

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BRIEF FOR APPELLEE.

I. INTRODUCTION.

Appellant-defendant in the above entitled case appeals from a final judgment of the U. S. District Court for the Northern District of California adjudging U. S. Letters Patent No. 2,317,064 issued to plaintiff-appellee on April 20, 1943, and particularly claims 1 to 4 thereof, valid and infringed by certain oxygen tank carrying trucks manufactured and used by appellant-defendant.*

The suit involves only the question of infringement of said Letters Patent. *The question of validity is not in issue since the answer did not plead that defense (4-7). ***

*The parties will hereinafter be referred to as plaintiff and defendant as was true in the lower Court.

**The record comprises two volumes of which the second is the Book of Exhibits. Numerals in parenthesis herein refer to the page numbers of said record. Italics as used throughout the brief, unless otherwise noted, may be considered ours.

II. THE TESTIMONY CONSIDERED.

A. THE INVENTION IS A DEVICE FOR MOVING A GROUP OF HEAVY GAS CYLINDERS SAFELY AND EASILY.

The record shows that the plaintiff, Josephian, was the patentee and owner of the patent in suit covering a Tank Truck for use in moving heavy gas holding cylinders (10-11). The patent, Plaintiff's Exhibit 1 (197-200), states its object as follows:

"It is another object of my present invention to provide means for clamping a plurality of tanks into a unit which can be readily moved from place to place by tilting and rolling, together with means for reducing the danger of upset * * *

"My invention broadly therefor, is the grouping of several cylinders into a manoeuvrable unit capable of being handled by one man, and spotted easily without the aid of any mechanical device. The unit will not lose balance and tip over * * *" (page 1, column 1, line 50 to column 2, line 9).

From the above, it is clear that no contention is made that the invention is a revolutionary discovery. It is simply alleged that the device provides novel means for safely and easily moving a plurality of heavy cylinders, a procedure which was, in the past, very slow, laborious and dangerous.

Oxygen, acetylene and other gases used commercially are normally supplied from heavy cylindrical tanks, delivered to the job by the manufacturer, each of which weighs in the neighborhood of 600 pounds (34-39). They must be replaced frequently and when new units are delivered, these must be attached to the main gas line by semi-flexible metal tubes called "pig-tails" provided with

couplings on their outer ends. Obviously it is desirable to connect the pig-tails with the least possible amount of shifting and moving of the tanks, both to avoid working the heavy cylinders about and to prevent breaking of the pig-tails. Since one man usually handles deliveries, the units must be made to be easily and accurately "spotted" without danger to the worker through upset and it is this object which the invention makes possible (38-40).

The present invention comprises a so-called truck on which a plurality of individual tanks may be secured for ease in such handling without danger of the unit tipping over and injuring the worker. The commercial embodiment of the invention is shown in Plaintiff's Exhibits 8A and 8B (209-210) and is also shown in the patent drawings (198).

Using the reference numerals of the patent (197-200), the unit comprises a bottom base plate 8 and a top plate 6 through which latter the outlet valves 4 of the gas tanks 1 extend. The two plates are connected, and thus hold the tanks in position, by means of tie-rods 9 positioned around their peripheries. A circular track 11 of somewhat smaller diameter than the base plate 8 is secured centrally of the latter's under side, as can best be seen in Figs. 1 and 3 of the patent drawings and in Plaintiff's Exhibit 8A. The function of this track is to permit the entire unit to be slightly tipped to one side so that it may easily be rolled along the track by one man. The track is so chosen in diameter and thickness that as the unit rests in the tipped position on both the track and the periphery of the base plate, it is in no danger of falling over and will require the application of a substantial addi-

tional force to make it do so. Thus the entire unit may be easily moved about by rolling to any exact and desired location without danger and without any more effort than is required to move a single tank (42). There is no evidence to show that a plurality of cylinders had ever before been connected together for such ease and safety in handling. The only so-called prior art, Defendant's Exhibits A1-A3, B1-B4, C1-C4 (231-241), comprised cranes, hand trucks or trailers for moving the cylinders.

In describing the operation and safety characteristics of the truck, the patent specification chooses the word "stable" to describe both positions (Figs. 1 and 3 of the patent) in which the truck is used and operated. There is the upright or normal stable position with the track flat on the floor, and the tilted stable position in which the unit is in a slanting position. Thus, if the unit slips while being tilted or rolled, it will come to rest in either one of these stable positions (see patent, page 2, column 1, lines 31-38).

Likewise, the specification points out that tracks of various diameters and thicknesses may be used depending upon the dimensions of the unit and the purpose for which it is to be used (page 2, column 2, lines 4-5). The specification further emphasizes that the particular application illustrated in the drawings is only "*one preferred form*". It clearly states:

"I wish it to be distinctly understood that the drawing given herewith is illustrative only, and that the relative diameters of track 11 and lower plate 8 may be varied as desired to control the amount of force necessary." (page 2, column 1, lines 43-47).

Thus, the specification and claims must be interpreted in this light and were clearly not intended to be restricted to the preferred form shown in the drawings. The patentee, William Josephian, testified that his purpose was to construct a multiple-unit truck which could be moved with a minimum of effort on the part of the worker and which had these safety positions to prevent injuring him should the unit "lose balance and tip over." For this reason, he provided the tilted stable position, from which "a second and preferably greater application of force will be necessary in order to tilt the unit still further laterally" (41-42).

B. NO PRIOR ART WAS CITED AGAINST THE INVENTION IN THE PATENT OFFICE AND NO ANTICIPATIONS ARE SET UP BY DEFENDANT.

The history of the granting of the patent in suit and the proceedings here are of importance.

In the first place, the Patent Office cited no art during the course of prosecution of the application and the first seven of the original eight claims submitted were allowed in the first Office action (224). The remaining claim was immediately cancelled and the patent issued without further prosecution except for a minor correction of the drawing (225-229). The Patent Office was thus quick to recognize the unique contribution made by the patentee in solving a problem that others had not solved.

The second point which is of interest and which is unusual in an action for infringement is that the defense of invalidity was not pleaded in the answer and no claim has

been made by defendant that the invention is anticipated by the prior art; a recognition by the defendant of the merit and scope of the invention. As stated by the attorney for defendant, at the close of the evidence (170):

“We do not contest whether it is invention or not. I would be willing to admit that for the purpose of this case.”

The defendant has thus paid tribute to the invention by its admission of validity, its failure to cite any anticipating references, and by its use of the infringing device, the full equivalent of the invention.

C. THE INFRINGING DEVICE WAS DEVELOPED WITH THE JOSEPHIAN INVENTION IN MIND AND IS IDENTICAL WITH IT.

The defendant's device is shown in Plaintiff's Exhibits 7A and 7B (207-208). Its similarity to plaintiff's device is marked, as well it might be, for *defendant, plaintiff's competitor, never used any type of four-cylinder truck until after the date of issuance of the patent in suit*, and then only after it had studied the plaintiff's patent and his commercial device (97-101). It is thus clear that defendant deliberately built a unit performing the functions of plaintiff's invention.

It appears that the patent had been brought specifically to the attention of defendant on several occasions prior to its building the devices alleged to infringe, once at a Detroit convention (53-56), again at a convention in Denver (56) and still a third time on a visit of defendant's employees to plaintiff's plant (57).

Defendant rendered further appreciation to plaintiff and his invention by employing a former employee of plaintiff (57-58) to help design the infringing truck (100-101).

The infringing device has a base plate in all respects similar to the Josephian base plate. Instead of a separate track on the bottom of defendant's device, there is provided a circular dished portion pressed out of the plate, and on which the device rests, as can best be seen in Plaintiff's Exhibit 7A. This dished portion is the full equivalent of the Josephian track (61-62) as admitted by Mr. Doble, defendant's expert, under questioning by the Court, when he stated that the difference between the two was "immaterial" (126).

D. THE DEVICES FUNCTION IN AN IDENTICAL MANNER.

It appears from the patent specification (page 2, column 2, lines 4-11), and is not denied; that the height and the diameter of the Josephian track is variable depending upon the desired result. The particular track chosen for illustration in the patent is one which causes the entire unit to remain in the tilted stable position (see Fig. 3 of the patent) when all support is removed.

On the other hand, the defendant's device (Plaintiff's Exhibits 7A and 7B) will not remain unsupported in this titled position: it will tend to teeter back to the upright stable position.

Defendant has attempted to make much of this difference. That it is not important and is not the object of

the invention, however, appears from the testimony of the inventor that he fully realized that a slight variation in either the thickness or diameter of the track would cause it to operate differently. The particular track chosen for illustration and use was taken because a standard one-inch pipe could be used for the track (74-75).

If the height of the ring under defendant's device is increased by a very slight amount, it, too, will remain in the tilted stable position, identically with the patent illustration. This fact was forcibly demonstrated during the cross examination of Mr. Doble, defendant's expert. An aluminum plate (Plaintiff's Exhibit 10), and shown in Plaintiff's Exhibits 7A, 7B, 8A, and 8B (207-210), had been brought into the courtroom to protect the floor. The defendant's truck was so positioned that the dished portion was resting on the aluminum plate and the periphery of the base plate was overhanging the aluminum plate. *When the unit was tipped to the tilted stable position with the periphery of the base plate resting on the floor, the unit remained in the tilted position without any support whatsoever (147-149).* Mr. Doble was requested to measure the thickness of the plate and found it to be only 3/16" (149). From this, the lower court quickly and correctly concluded "that means that if the basal member were thickened by 3/16 of an inch on the defendant's device, it would come to rest in the same manner as plaintiff's device does" (149).

That the units are likely to be used under conditions where the floor is not level and that the device may well operate normally in this fashion was also brought out in

the testimony of a test made at one of defendant's installations. Mr. Metcalf, plaintiff's expert, testified that he had observed certain of defendant's devices under actual use. He stated that these units were used on a planked floor and that in certain places where the floor was slightly uneven, defendant's devices came to rest in the tilted stable position, the same as Josephian's (161-162).

It can only be concluded that defendant has knowingly taken and used the gist of Josephian's invention and is here relying on a technical definition of words in an attempt to avoid infringement.

**E. A STABLE POSITION IS NOT ONE OF REST
OR IMMOVABILITY.**

As has been stated above, the patent speaks of two *stable* positions, the upright stable position (Fig. 1) and the second or tilted stable position (Fig. 3). Because the claims in suit refer to this second stable position, the definition of the term is important.

The word *stable* is, at the outset, a relative term and does not imply immovability or rest. Both the New Standard Dictionary (1927) and Webster's New International Dictionary, 2nd Ed. (1941) define the word:

“* * * not easily moved, shaken or overthrown.”

The defendant's own expert directly admitted that *stable* did not mean immovable but that it is a relative term (146). Mr. Josephian testified that the term “*stable*” did not necessarily mean a position of rest but

one "where the unit stops and a greater force has to be applied in order to bring it over before it falls down" (73).

Mr. Metcalf, the patent attorney who prepared and prosecuted the patent in suit (159), testified that the word stable as used in the patent, meant stable in the direction of overthrow or a place where an increased force is necessary to make it fall down. He also stated that a device need not be motionless to be stable, citing the examples of moving cars and airplanes (166-168).

In concluding this discussion, it is important to note that defendant's device, once placed in the tipped position, also requires a substantially increased force to cause it to overturn (165), just as is true of the Josephian unit. Thus, in spite of the fact that on a perfectly smooth floor defendant's device will teeter back to the upright position, it does reach a position stable as against overthrow, the main object of the patent in suit.

Plaintiff has no quarrel with the defendant's argument that a patentee is his own lexicographer and that the words of the claims find their definition in the specification. But reading that description in its entirety, and considering the definitions set forth (see page 2, column 1, lines 21-24, 31-47), it is clear that by a second stable position the patentee referred to a position, not of rest, but one where an additional force was required to overturn the unit.

III. THE ISSUE.

The issue on appeal is exceedingly simple. The Josephian patent illustrates a device which, when tipped into the "second or tilted stable position" (Fig. 3), will remain in that leaning position. It will neither fall to the ground without the application of an appreciable additional force nor return to the upright stable position (Fig. 1).

The defendant's device differs only in that, when placed in a tilted stable position on a perfectly smooth floor; it will return, as by teetering, to the upright stable position.

Thus the only question for the Court, as is admitted in defendant's Statement of Points Relied Upon on Appeal (185-187), is simply whether defendant may escape the penalty for obvious infringement of the Josephian patent by decreasing the height of the ring by $3/16''$ so that the device will not remain in the tilted position—a position described by the Court as a Leaning Tower of Pisa, in which no objective is accomplished (174).

IV. ARGUMENT.

A. THE PATENT IS ENTITLED TO BE BROADLY CONSTRUED BECAUSE OF THE LACK OF PRIOR ART.

It is still axiomatic that a patent is to be liberally construed in order to protect to the patentee the fruits of his invention. Such was the purpose of the constitutional grant and the statutes which Congress has subsequently passed. This rule of law has been stated in

various ways, but the Supreme Court in *Klein v. Russell*, 86 U.S. 433, 466, 22 L.Ed. 116, used these words:

“ * * * The Court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed.”

Again, in *Topliff v. Topliff*, 145 U.S. 156, 171, 36 L.Ed. 658, the Court said:

“ * * * The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation.”

This Court, in the recent case of *Brodie Co. et al. v. Hydraulic Press Mfg. Co.*, 151 F. (2d) 91, C.C.A.9, reaffirmed this rule as stated by Judge Goodman, the Judge who tried the present case:

“I think Ernst made a useful discovery. True, he did not create some new art; but, viewed in the light of the rather crude machines which antedated him, and which appear to have contributed little of a utilitarian character, the later machine which resulted from his invention is fully worthy of patent protection. Being a meritorious improvement, the rule ‘ut res magis valeat quam pereat’ applies.” (51 F. Supp. 205)

See also *Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F. (2d) 628, C.C.A. 9.

The presumption normally arising upon the issuance of a patent is materially strengthened in a case of this

sort where no art was cited by the Patent Office. Thus the normal inherent limitations introduced into claims by prior art structures do not here exist. The only art cited by defendant has not even seriously been contended to restrict the claims in suit. This art shows a group of ten cylinders mounted together for transportation on a wheeled dolly; a flat plate with an upstanding central post adapted to carry cylinders by means of a cable and crane; and a trailer adapted to carry a large group of manifolded cylinders to and from a job. None of these devices was designed for or is capable of being moved except by some mechanical aid and none of them provide the safety feature introduced by Josephian to prevent upset and injury.

Effectively, then, no real prior art is here under consideration. The patent therefore is entitled to be very liberally construed.

This particular doctrine, as concerns the lack of prior art, has been well stated recently in *Hartford-Empire Co. v. Demuth Glass Works*, 19 F. Supp. 626, 634:

“The patent in suit is * * * *unlimited in scope* by prior art or by specific limitations in claim phraseology, and there is no doubt as to the validity of the patent, *therefore, there is no ground for confining the claims to the device shown and described.* *Hildreth v. Mastoras*, 257 U.S. 27, 34, 42 S. Ct. 20, 23, 66 L. Ed. 112; *Mergenthaler Linotype Co. v. Press Pub. Co. et al.* (C.C.) 57 F. 502, 505, 506; *General Electric Co. v. P. R. Mallory & Co., Inc.* (D.C.) 294 F. 562; *Continental Paper Bag Company v. Eastern Paper Bag Company*, 210 U.S. 405, 28 S. Ct. 748, 52 L. Ed. 1122.”

It must, therefore, be concluded that the patent in suit is entitled to be broadly construed and that this is so even though it is limited to a particular field in the art. It is unnecessary to warrant a broad construction that the patent start or conceive an entirely new and broad art. It is sufficient if it solves a problem in a way unknown to the prior art. *Freeman v. Altvater*, 66 F. (2d) 506, C.C.A. 8.

From this discussion and from the facts quoted above, it is apparent that the gist of the Josephian invention is a truck, capable of safely handling a plurality of cylinders, comprising a base plate and a smaller circular track on its bottom side and which has an upright and a tilted stable position. Any other construction robs the patentee of his expressed intention and destroys the grant. This construction is the one accepted and approved by the Patent Office and was clearly stated by the court below (176):

“ * * * it seems to me that the claim should be interpreted in a case like this with at least sufficient liberality to give some reality to the invention rather than to make it a sort of illusory thing that anyone could change an ‘i’ or cross a ‘t’ there to get away from it. I think the evidence in this case and all the exhibits justify a more liberal interpretation of the claim.”

B. THE CLAIMS ARE NOT LIMITED TO THE "PREFERRED FORM" SHOWN IN THE PATENT.

The defendant's contentions seek to rob the patent and its claims of all reality by attempting to limit the scope of the claims to a specific illustration set forth in the specification and drawings. The contrary rule is so well settled that citation of authority would ordinarily be unnecessary. But the stress which defendant places on this erroneous contention requires it. In the famous *Paper Bag Case* (*Continental Paper Bag Company v. Eastern Paper Bag Company*), 210 U.S. 405, 418, 52 L.Ed. 1122, Mr. Justice McKenna stated the rule as follows:

"We think it is clear that the court considered that Liddell sought to comply with §4888 of the Revised Statutes. In other words, he filed a description of his invention, explained its principle and the best mode in which he 'contemplated applying that principle,' and did not intend to give up all other modes of application. An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. 'The principle of the invention is a unit, and invariably the modes of its embodiment in a concrete invention may be numerous and in appearance very different from each other.' Robinson on Patents, §485. The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention * * * Liddell was explicit in the declaration that there might be alternatives for the device described and illustrated by him."

Another statement of this doctrine appears in *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 97 F. (2d) 945, 946, C.C.A. 10, where the Court said:

“ * * * But it is not essential that all of the embodiments of a patent be described. *It is enough if the invention be described together with that mode which is conceived to be the best for putting it into practical use; and where that has been done, the patent is not confined to the precise mode outlined.* Tilghman v. Proctor, 102 U.S. 707, 26 L.Ed.279; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 S.Ct. 748, 52 L.Ed. 1122.

“Neither is it necessary that every embodiment be illustrated by the drawings unless the form of the device is the principle of the invention. Where the particular form is not an embodiment of the principle of the asserted invention, the patent is not restricted to the exact form of construction shown in the diagrammatical drawing. And a device infringes if it embodies the essential principles taught by the patent, even though there is a departure from the drawings to the extent of simple changes which would be readily conceived and made by a mechanic in the course of constructing a device on the patent. Johns-Manville Corp. v. National Tank Seal Co., 10 Cir., 49 F.2d 142; Pangborn Corporation v. W. W. Sly Manufacturing Co., 4 Cir. 284 F. 217, certiorari denied 260 U.S. 749, 43 S. Ct. 249, 67 L.Ed. 495.”

See also *Kennedy et al. v. Trimble Nursery-Land Furniture, Inc.*, 99 F. (2d) 786, C.C.A. 2.

Applying the reasoning of these cases to the facts here, it is clear that the Josephian claims are not to be limited by construction to a device which will remain in the tilted stable position. This was only the mode of operation illustrated in the drawings and is particularly applicable to a very heavy seven cylinder unit. The specification clearly

states that the claims are not intended to be limited to this form and that various other structures permitting easy and safe transportation of multiple cylinder units could be constructed in accordance with the invention. Defendant's device is so nearly identical with the illustrated form that it can hardly even be classed as an alternative construction. In any case, the fact that in tipped position, a substantially greater force is required to overturn it, makes the device respond to that part of the claims calling for the second stable position.

C. A DEVICE WHICH HAS EQUIVALENT ELEMENTS AND PERFORMS THE IDENTICAL FUNCTION OF THE INVENTION IS AN INFRINGEMENT.

The substance of defendant's argument on this appeal is that infringement of the Josephian patent may be avoided by decreasing the height of the rolling track by 3/16" so that its device will not remain unsupported in the tilted stable position, a position having no particular purpose nor utility.

This contention makes the doctrine of equivalents pertinent for consideration, but it must be kept in mind that defendant contends infringement is avoided by eliminating an unintended and unrequired characteristic of the invention. Mr. Josephian testified that "We can't use it in that position, we don't sell gas that way, we don't handle it that way, and we don't do anything that way" (75), and the lower Court used similar language with reference to the position in question (174).

The claims call for “a second stable position when resting on said periphery (of the track 11) and edge of said lower plate” (or substantially similar wording). Since defendant, through its expert, admitted that its depression or ring was equivalent to the Josephian track (126), *the only equivalency for the Court to determine is that of function. Walker on Patents, Deller’s Ed., Section 466, et seq.*

The test as laid down by the Supreme Court and applied in *Union Paper Bag Machine Co. v. Merrick Murphy*, 97 U.S. 120, 125, 24 L. Ed. 935, is as follows:

“Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.

“Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result,

as well as at the means by which the result is attained.”

Another excellent statement of the same rule appears in the case of *Baldwin Rubber Co. v. Paine & Williams Co.*, 99 F. (2d) 1, 5, C.C.A. 6, where the Court said:

“The usual tests of equivalency are identity of function and substantial identity of performance. In a combination patent, *if the alleged infringing device is made up of the principal things precisely as described in the patent and attains the same result, infringement is present, though minor parts may be omitted or taken from well known equivalents.* *Elames v. Godfrey*, 1 Wall. 78, 68 U.S. 78-80, 17 L.Ed. 547; *McDonough v. Johnson-Wentworth Co.*, 8 Cir., 30 F.2d 375.”

The doctrine of equivalents has also often been stated by this Court. In *Jay v. Suetter*, 32 F. (2d) 879, 881, C.C.A. 9, Judge Dietrich stated:

“ * * * Where a combination patent makes a distinct advance in the art to which it relates, as does the appellant’s invention here, the term ‘mechanical equivalent’ should have a reasonably broad and generous interpretation. *Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works* (C.C.A.), 261 F. 85. We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. *Westinghouse v. Boyden Power-Brake Co.*, 170 U.S. 537, 568, 18 S.Ct. 707, 722 (42 L.Ed. 1136).”

In *Stebler v. Riverside Heights Orange Growers Assoc.*, 205 F. 735, 739, C.C.A. 9, the same judge adopted the

language of the Second Circuit Court of Appeals as follows:

“The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff’s patent. The question is, not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance of the invention.”

He continued in his own words:

“True, the plaintiff’s rights do not extend beyond the claims in suit, and are subject to the limitations thereof; but the language of these claims is not, as argued by the defendants, to receive a narrow, literal construction. While the invention is not basic or primary, it is substantial and important and is therefore entitled to a fair range of equivalents.”

See also *Johnson Co., Inc. v. Philad Co. et al.*, 96 F. (2d) 442, C.C.A. 9.

The doctrine as applied to the present facts requires an affirmance of the conclusion of infringement. Here the infringing device possesses all the elements of the claims, operates in the same manner, performs the same functions and is effectively identical in everything except the precise thickness of the track. By reducing this dimension by $3/16''$, the defendant argues that infringement is avoided because the unit will not stand unsupported in the second stable position. Defendant attempts to import a requirement of immovability or rest into this position and argues that this was the major purpose of the invention. But this is a mere conclusion unsupported

by the evidence and contrary to the statement in the patent that only the preferred form is shown and described.

This reasoning ignores the fact that the defendant's device deliberately adopted all of the equivalent elements of the invention, and performs the identical function. The answer to this contention that a mere formal and immaterial change avoids infringement is found in the case of *Foster v. T. L. Smith & Co.* 244 F. 946, C.C.A. 7, a case similar on its facts to the present controversy. In that case the preferred form of the invention, a cement mixer, showed a frame perpendicular to the receptacle's axis of revolution, but this limitation was not included in the claims. The Court said, at pages 953, 954:

“There is no contention that appellees' commercial machine does not conform to the claims in suit in all respects except one; and that is in respect to ‘the tiltable frame in which the receptacle is supported.’ In the specific claims, which are addressed to the preferred form of structure, the tiltable frame is required to be in a plane to which the axis of the receptacle's revolution is perpendicular. In the claims in suit there is no limitation with respect to the relation of the plane of the frame and the line of the axis of revolution. And if the preferred form of tiltable frame were placed in a plane in which the line of the axis of revolution would lie, there would seem to be no basis whatever for saying that the structure would not be within the letter and spirit of the claims in suit * * *

“It is to be remembered that the specification told the persons who proposed to use the invention as described in the claims in suit that they could employ

a frame of any form adapted for supporting the receptacle * * *

“Appellant’s structure very plainly has been taken from appellee’s commercial structure. They are exactly the same in operation and result. Two small differences appear. One is that the circular toothed rack is placed slightly away from the exact ‘largest diameter’ or ‘middle’ of the receptacle. The other is that the mouth of the pot-shaped receptacle is prolonged so that the receptacle cannot be revolved through the 360 degrees by reason of striking the bottom of the circle. But the circular toothed rack is so near the largest diameter of the receptacle that all of the advantages of the patent are secured in that respect. And with respect to tiltability, all of the advantages of loading on one side and discharging on the other are obtained as fully as in the patented structure * * * *These changes impress us as having been intentionally devised for the purpose of creating a verbal differentiation. But infringement is not thereby escaped, if the defendant has actually appropriated the real substance of the invention.* Adam v. Folger, 120 Fed. 260, 56 C.C.A. 540; United States Metallic Packing Co. v. Hewitt Co. (D. C.) 220 Fed. 171.”

D. INFRINGEMENT IS A QUESTION OF FACT, THE DETERMINATION OF WHICH IS NOT TO BE REVERSED UNLESS MANIFEST ERROR APPEARS OR THERE IS NO EVIDENCE TO SUPPORT IT.

It is believed that the lower Court found infringement, validity being admitted, in accordance with the principles set forth above. It is well settled that the question of infringement is one of fact and that a determination will

not be set aside unless it is clearly erroneous or entirely unsupported by the evidence. This doctrine has been closely adhered to by this Court for many years, most recently in *Brodie Co. et al. v. Hydraulic Press Mfg. Co.*, 151 F. (2d) 91, C.C.A. 9, and was stated by this Court in *Reinharts v. Caterpillar Tractor Co.*, 85 F. (2d) 628, 630, C.C.A. 9:

“The question of infringement also is a question of fact.” (citing Supreme Court cases)

“On both questions—the question of validity and the question of infringement—the trial judge, who personally heard the evidence and personally inspected the accused tractors, decided against appellant. *His findings, unless clearly wrong, should not be disturbed.*” (citing cases)

The defendant here has not contended that the findings of the lower Court in this respect are not supported by substantial evidence nor has it pointed out wherein Judge Goodman’s conclusions were clearly erroneous. Having failed to do so, it is apparent that defendant has not carried its burden of proof as required by the cases cited above.

All that defendant has done here is to contend for an interpretation of the claims which would import, as a limitation of the claims, an effectively useless function of the device—that of standing like the Leaning Tower of Pisa without external support. Such an interpretation of the claims would effectively emasculate them and permits the defendant to appropriate the heart of the Josephian invention. It is difficult to imagine a more inequitable construction; one which limits the patentee’s

device to a structure possessing a useless and incidental function, leaving the gist of his invention for the use and benefit of his competitors.

E. THE DEFENDANT'S BRIEF.

The primary contentions of defendant are felt to have been completely answered in other sections of this brief. But in several instances (pp. 8, 20 and 21) the Brief on Behalf of Appellant erroneously charges that plaintiff's counsel attempted to mislead the lower Court by introducing a "grossly misrepresentative drawing", Plaintiff's Exhibit 6.

This charge is false and is not supported by the record. It would have been ridiculous for plaintiff to urge the Court to determine infringement from a drawing when the actual devices and blue print were before the Court (Plaintiff's Exhibits 7A, 7B, Defendant's Exhibit E). At the time of admission, plaintiff's counsel, stated to the Court (63):

"I expect to put the defendant's device in evidence, or a photograph of it, so there is no question about that."

That the Court understood that the drawing was illustrative only and was in no way confused is obvious from its subsequent statements (133):

"* * * He said it was not accurate as to dimensions. The blueprint which you offered, and the testimony supported it, showed it was inaccurate. * * * Counsel's exhibit is only to show generally how it looked rather than being an accurate portrayal. * * *

“* * * It seems to me * * * that it is unnecessary to point out on the diagram something that is admitted already, namely that it is not clear—”

This is a bald attempt on defendant's part to obscure the issues and may be completely ignored. Plaintiff introduced the infringing device into evidence for consideration by the Court and the drawing was introduced only for convenience in discussing the structure of the device and was intended to and indeed did not serve any other purpose.

V. THE OPINION OF THE LOWER COURT.

Judge Goodman's opinion, delivered orally at the close of the evidence, is thought to be a masterly statement of the facts and the law of this case. It is a logical, well reasoned decision, and indicates an intelligent and common sense approach to the issues. Because it is so concise and indicates such a clear understanding of the issues, pertinent portions are reproduced here (173-176):

“Along comes Mr. Josephian and he devises this ring by which it is protected from falling over. Now, your client makes that ring a little narrower with the result that it does not tip over because it comes back to its original position. The object of the invention is not to perform some example with mechanics or mathematics. It is to accomplish a desired result, isn't it, and shouldn't we measure these bursts of genius we have in terms of what they are aimed at rather than to prove some mathematical formula or mechanical formula?

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“You do not think that the main object of this invention was to create a sort of Leaning Tower of Pisa? I mean there is nothing to be accomplished by having a group of cylinders get themselves into this position, except it might have created some conjecture as to why that is, but the object is not to do that. The object is to get this thing in a stable position so it won't fall over. The way that is done is this. Surely the inventor did not have in mind all he was going to do was to bring about a situation where he could display to the trade these devices set up in this position because that would not interest them. What possible profit could that bring about? It has been said he could not sell the object in that way. That would not be persuasive. No salesman could gain anything by saying, ‘My boss, Mr. Josephian, has got a set of cylinders that he is able to stand up on edge that way.’ That would not aid him at all. It seems to me the thing we have to consider is what is the object, what is the main thing you are aiming at?

* * * * *

“I feel that way about because looking at it from a rather common sense practical point of view the device your client made was built in the same way, uses the same ring, and makes a little difference in the ring, and unquestionably he wanted to use it for the accomplishment of the same objectives of stability and maneuverability. I am not impressed by the argument that this particular ring, when the defendant knew about plaintiff's patent and what he was using it for, was put there for the purpose of facilitating the use of a truck, to get it on the truck. That does not particularly impress me. Apparently this is not the kind of case where the Court is particularly

required to go into the invention phase of the matter. As Mr. Boyken has said, it is not some revolutionary thing like the atomic bomb, but in its small way it appears to be a practicable and new way of handling these things. Your claim adopted that slight variation of the same plan, and it appears to me that it is a case in which an injunction should be granted.

“* * * it seems to me that the claim should be interpreted in a case like this with at least sufficient liberality to give some reality to the invention rather than to make it a sort of illusory thing that anyone could change an ‘i’ or cross a ‘t’ there to get away from it. I think the evidence in this case and all the exhibits justify a more liberal interpretation of the claim.”

VI. CONCLUSION.

The portions of the lower Court's opinion just quoted make it clear that the issue here is a simple one, involving only infringement. The defendant has made and ^{USED}~~SOLD~~ devices having elements corresponding to the claims of the patent in suit. The patent is for a unique and worthwhile device which performs a function never performed in the prior art and is, as a consequence, entitled to a broad and fair construction. Defendant's device contains all of the required elements and performs all of the same functions and is the full equivalent of the invention. Defendant should not be permitted to appropriate the invention of plaintiff and then escape infringement by a tortured, impractical construction of the patent in suit.

For these reasons, it is respectfully urged that this Court should affirm the decision of the lower Court finding the patent valid and infringed.

Dated, San Francisco, California,
March 28, 1947.

Respectfully submitted,

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No. 11,445

United States
Circuit Court of Appeals
For the Ninth Circuit

STUART OXYGEN Co., LTD.,

Appellant,

VS.

WILLIAM JOSEPHIAN,

Appellee.

Reply Brief for Appellant

FILED

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United States
Circuit Court of Appeals
For the Ninth Circuit

STUART OXYGEN Co., LTD.,

Appellant,

vs.

WILLIAM JOSEPHIAN,

Appellee.

Reply Brief for Appellant

INTRODUCTION

Nothing appears in the Brief for Appellee which can be taken to rebut the showing made in the Brief on Behalf of Appellant. The points raised by appellee require only short discussion to demonstrate their invalidity.

THE PATENTED DEVICE IS A MINOR IMPROVEMENT

The claims, and not the stated objects of the invention quoted at page 2 of the Brief for Appellee, define the invention.

Furthermore, Josephian testified that he was not the first to obtain the stated objects of his invention, saying (I, 66-67):

“Q. Your patent states a number of objects of your invention and as I read this particular passage I would like you to consider it with the purpose of telling me whether or not you regard yourself as the first to accomplish these objects. Beginning at Page 1, Column 1, Line 5, you say:

‘Among the objects of my invention are: to provide a simple and efficient truck for handling a plurality of cylinders; to provide a means for easily handling a plurality of heavy cylinders containing a usable gas; to provide a means for assembling a plurality of cylinders into an easily movable unit, and to provide a simple and efficient truck for handling gas cylinders, such as oxygen, hydrogen, acetylene, carbon dioxide tanks, or the like’. Did you consider that you were the first to accomplish any or all of those objects?

A. About providing an easy and efficient means, yes, I feel that I was the first to accomplish that effect, but as far as accomplishing portability is concerned, no. As I said before, there were others that had manifolded cylinders.

Q. You mean yours was comparatively more easy and comparatively more efficient than previous things— A. Yes.”

Under such circumstances the fact that defendant's device lacks the “second stable position” of the claims, and lacks the advantages of a structure having such a second stable position, as explained at pages 20 to 22 of the Brief for Appellant, is of great importance.

FAILURE OF THE PATENT OFFICE TO FIND THE NEAREST
PRIOR ART WEAKENS RATHER THAN STRENGTHENS
THE PATENT.

Plaintiff argues at page 5 of the Brief for Appellee that the allowance of the claims in suit, without citation of art, was a "recognition" of some merit in the patentee's device.

No authority is cited for such a proposition and all of the authority is to the contrary where, as here, it is clear that the Patent Office either overlooked or did not know of the nearest prior art.

The devices illustrated in Defendant's Exhibits A-1 and A-2 (II, 231-232); B-1 to B-4 (II, 234-237); and C-1 to C-4 (II, 238-241), manifestly were not before the Patent Office when plaintiff's patent was granted.

Under such circumstances it is well settled that any presumption which would otherwise attend the issuance of the patent is weakened by the circumstance that closely similar prior references, such as Defendant's Exhibits B-1 to B-4 (II, 234-237) in particular, were not interposed or considered by the Patent Office during the prosecution of the Josephian application. *Walker on Patents (Deller's Edition)*, Section 701, page 2010.

The logic of this rule is forcefully stated, in terms clearly applicable to the present case in:

American Soda Fountain Co. v. Sample, 130 Fed. 145, 149 (C.C.A. 3).

"We do not agree with the contention that the file wrapper discloses the patent to have been granted as first applied for, without any references, adds any force to the presumption of novelty arising from

the grant. On the contrary we think the force of that presumption is much diminished, if not destroyed, by the lack of any reference by the Examiner to, or consideration of, the 'Clark' patents. It does not seem likely that an expert examiner would pass them by, without notice or consideration, if they had been called to his attention."

This case was cited with approval and quoted at length by this Court in:

Stoody v. Mills Alloys, Inc., et al., 67 Fed. (2d) 807, 810 (C.C.A. 9).

Defendant's purported admission of validity quoted out of context at page 6 of the Brief for Appellee loses all force as a "tribute" when viewed in its context, as follows (I, 170):

"Mr. Lassagne: It would be skill in the art to put a bump on the bottom of the Western Steel device so you can wrestle it around more.

The Court: But with this last clause in it you do not claim that it is not an invention?

Mr. Lassagne: With the last clause in it, it is plainly not infringed. I think I can show you that.

The Court: No, with the last clause in it, is it invention?

Mr. Lassagne: We do not contest whether it is invention or not. I would be willing to admit that for the purpose of this case.

The Court: You say if that last clause was left off you would contest it; you would say it does not consist of invention?

Mr. Lassagne: It does not involve any invention whatsoever over the Western Pipe and Steel device, which it is admitted to have been in the prior art."

DEFENDANT'S CONSIDERATION OF PLAINTIFF'S PATENT AND
COMMERCIAL DEVICES WAS GIVEN UNDUE WEIGHT BY
THE TRIAL COURT.

The fact that defendant studied the plaintiff's patent and his commercial device before building a device used for a similar purpose is brought forward at page 6 of the Brief for Appellee, apparently as evidence of intent on the part of defendant to appropriate plaintiff's purported invention.

That this contention influenced the trial court is made plain by the comment of the Court (I, 175) that "the defendant knew about plaintiff's patent and what he was using it for."

Far from being evidence of any intent to appropriate anything covered by the patent in suit, such facts are clear evidence of respect for plaintiff's ostensible patent rights, whether or not the patent be valid.

The Circuit Court of Appeals for the Seventh Circuit has made clear that no inference adverse to defendant can be drawn from such conduct, saying in:

Atkins, et al. v. Gordon, 86 Fed. (2d) 595, 596
(C.C.A. 7):

"One may legitimately study the patent and microscopically examine the language of the claim in order to make a product which will serve the same purpose and yet avoid infringement of the patent. Such a right is the logical, beneficial result which was sought through the adoption of the comprehensive patent system of our government.

* * * * *

"Appellants were not barred from making ear muffs simply because appellee acquired a patent on a certain kind of ear muff. *They were at liberty*

to examine appellee's ear muffs and his patent to ascertain its length and breadth. Likewise they could examine the prior art to ascertain what range of equivalents should be given to the various elements set forth in the claim. If they could make ear muffs without utilizing one of the elements of the claim, they were perfectly free to do so. *Whether it was done deliberately or accidentally, with the patent before them or otherwise is quite immaterial.* The question is, Did their ear muffs infringe the claim in question?" (Emphasis supplied.)

**A "STABLE POSITION" AS DEFINED IN THE PATENT
IN SUIT IS NECESSARILY A POSITION OF REST**

The Brief for Appellee goes to great lengths in attempting to avoid the effect of the definition of a "stable position" contained in the specification of the patent in suit. It is submitted that the Record does not support the statements made in appellee's brief on this subject.

At page 9, the Brief for Appellee says "the defendant's own expert directly admitted that stable did not mean immovable but that it is a relative term"; citing page 146 of the Record. There we find Mr. Doble, speaking of an artillery shell in flight, saying:

"A. Certainly (it is more stable than it would be without the rifling), but *it is not stable* in any sense of the word;"

Again at page 18, the Brief for Appellee says "defendant, through its expert, admitted that its depression or ring was equivalent to the Josephian ring" citing page 126 of the Record. There we find Mr. Doble saying exactly the opposite:

“Q. If the ring that is on the defendant’s device were widened so that the proportion would be the same, as in the case of plaintiff’s device, it would result in the center of gravity that would enable it to have the secondary position of plaintiff’s device?

A. That is the point. It takes a minor change in the structure to bring about that advantageous feature, which is the claimed feature, and which is the essence of that patent all the way through.”

CONCLUSION

It is submitted that the reasons for reversal of the decision of the District Court which were advanced in the Brief on Behalf of Appellant remain valid and such action is respectfully urged.

Respectfully submitted,

NAYLOR AND LASSAGNE,

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*Attorneys for Defendant-
Appellant.*

Dated at San Francisco, California, April 23, 1947.

No. 11,447

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FONG HOW TAN,

Appellant,

VS.

ARTHUR J. PHELAN, Acting District Director,
Immigration and Naturalization
Service, Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

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No. 11,447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG HOW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from an order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus. (Tr. p. 8.)

The appellant is a native of China. He arrived in the United States in August, 1910, and he was duly admitted for permanent residence by the United States immigration authorities for the Port of San Francisco. He has resided continuously in the United States from the date of entry until the present date. On June 11, 1925, after he had resided in the United

States for more than 5 years, an indictment was returned against the appellant in the Superior Court of Fresno County, California, charging him with two (2) counts of murder. This indictment is fully set forth in the Immigration records on file before this Court. On July 21, 1925, the appellant was found guilty of 2 counts of murder and sentenced to serve a life term in San Quentin.

ARGUMENT.

The immigration authorities claim the right to deport the appellant under a warrant issued by the Attorney General charging in substance that the appellant has been sentenced to imprisonment more than once for a term of one year or more for the commission, subsequent to entry, of a crime involving moral turpitude.

The essential point to be determined in this case is the construction to be placed upon Section 155(a) Title 8 U.S.C.A., which reads in part as follows:

“* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or *who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry* * * * shall, upon

*the warrant of the Attorney General, be taken into custody and deported * * *.*" (Italics supplied.)

* * * * *

"The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter. * * *"

Congress, therefore, has differentiated between aliens, who have been once sentenced and those who have been sentenced "more than once". The former class may be deported only if the crime was committed within five years after entry; the latter class without regard to the length of time after entry that their crimes were committed.

It will be conceded that the case of the appellant falls within the latter class and the sole question, therefore, is

"Has the appellant been sentenced more than once to a term of imprisonment of one year or more."

The point raised by this appeal is not new, nor is it unique. It was considered in the case of *United*

States ex rel. Mignazzi v. Day, 51 Fed. (2d) 1019, where Judge Learned Hand commenting upon a situation similar to the one presented here, uses the following language:

“Congress might have made the test merely the conviction for any shameful crime, or conviction for such a crime if a sentence of one year might be imposed. Either would have embodied an intelligible policy, but neither was chosen. On the contrary, a judge must actually sentence the alien to imprisonment for a year, and thus indicate that the particular circumstances of the offense warrant so much reprobation. If the alien has lived here for five years, the judge must do this twice. We agree that each count in an indictment, like each indictment itself, is a separate charge, and that nothing is lost or gained by the form of pleading adopted. Moreover, there must be a judgment upon each charge, however pleaded, in order to dispose of it; the only judgment in a criminal case is the sentence; procedurally a general sentence to ‘run concurrently’ is a separate sentence on each count. We are as clear, however, that although a judge does in this sense impose more than one sentence in such a situation, he sentences the convict to one term only; that though he imposes several sentences, he exacts but one punishment; in short that he does not ‘more than once’ sentence ‘to a term of imprisonment.’ *It is the duplication of penalties which counts; and the test of these is practical, not procedural. Any other construction leads to absurd results.*” (Italics supplied.)

At the risk of repetition we repeat the words of Justice Hand,

“It is the duplication of penalties which counts; and the test of these is practical, not procedural. Any other construction leads to absurd results.”

We also wish to point out the decision of Judge Sibley in *Opolich v. Fluckey, Director of Immigration*, 47 Fed. (2d) 950, where he said:

“Whether he can be deported depends upon whether or not he has been sentenced more than once to a term of imprisonment because of a crime involving turpitude. Technically he committed four crimes, notwithstanding they were connected together and apparently in the same scheme of counterfeiting. Possibly he may be said to have been sentenced for all four, but it seems to me a great strain of language to say that he has been sentenced more than once. *And in my opinion Congress had in mind what are commonly called ‘repeaters,’ that is to say, persons who commit a crime and are sentenced, and then commit another and are sentenced again. These last I think were the persons who were intended to be deported, notwithstanding they may have been residents of this country for more than five years.*” (Italics supplied.)

The appellant herein was not charged on two separate occasions with two separate and distinct offenses, but was charged in one indictment of two counts. All offenses committed by him obviously arose out of one transaction during which he killed two men. It was one transaction and not two isolated

instances. The record will show that the alleged offenses were committed as one activity at the same time and the same place. It is analogous to the situation wherein a defendant may have, for instance, by the use of explosives or by means of driving an automobile killed two or more persons during the consummation of one criminal act. It is the law of the United States that a man who commits one offense, after having been in the country for five years, cannot be deported because of the commission of that offense, and it is obvious that it was the intent of Congress to deport only those persons who repeated a criminal offense and not those persons who by a technical application of the law can have their single crime so divided as to constitute separate offenses. An analogous example is the possession of counterfeit money where a man who has in his possession a number of counterfeit bills is actually committing the offense of having possession of counterfeit money, but under the technical rules of pleading he can be charged for a separate offense for each bill in his possession, but it is obvious in such a case that practically only one offense has been committed.

CONCLUSION.

We submit that a review of the record in this case shows that it is not the type of case contemplated by Congress when it enacted Section 155(A) Title 8 U.S.C.A. and that this appellant has not in fact been sentenced more than once to a term of imprisonment.

This case is exactly of the type considered by the Courts in the cases cited herein.

We respectfully ask that the order of the Court below be reversed with directions to issue the writ.

Dated, San Francisco,
February 28, 1947.

Respectfully submitted,
THOS. C. LYNCH,
WM. J. CHOW,
Attorneys for Appellant.

No. 11449

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

JUL 18 1947

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11449

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against Flotill Products, Inc. (herein called respondent) on August 19, 1946 (70 N. L. R. B. 118; R. 74-107).² Jurisdiction of this Court is based upon Section 10 (e) of the Act. The unfair

¹ Relevant portions of the Act appear in the Appendix, *infra*, pp. 38-43.

² On November 6, 1946, this Court granted the petition for leave to intervene in this proceeding filed on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L. and California State Council of Cannery Unions, A. F. L. (R. 528-529).

labor practices occurred at respondent's plant in Stockton, California,³ within this judicial circuit.

STATEMENT OF THE CASE

A. The facts as found by the Board

This case presents the question of the validity of the Board's finding that respondent under the circumstances presented committed an unfair labor practice by entering into an exclusive-recognition and closed-shop contract with the A. F. L.⁴ on March 5, 1946. Briefly, the relevant and undisputed facts are as follows:

1. Prior contractual relations

In 1940, the A. F. L. entered into a bargaining agreement (herein called the master agreement) with California Processors and Growers, Inc. (herein, called C. P. & G.), the dominant trade association in the canning and processing industry for this California area (R. 25-26, 127-130, 268, 311-313). Respondent, although not a member of the C. P. & G., has for several years followed the practice of subscribing to the master agreement (R. 127, 304-306, 312-313); in addition, it has embodied in separate supplemental contracts with the A. F. L. matters not

³ Respondent, a California corporation, operates a plant at Stockton, California, where it is engaged in the canning and processing of fruits and vegetables, most of which are sold in interstate and foreign commerce (R. 124-126). Respondent concedes that it is subject to the Act (R. 125-126); hence no issue is presented as to jurisdiction.

⁴ International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and California State Council of Cannery Unions, A. F. L., and their predecessor A. F. L. organizations, hereinafter called the A. F. L. (R. 274-282, 290-291, 294-295, 302-304).

covered by the master agreement (*ibid.*). The last master agreement and respondent's separate contract were to expire on March 1, 1946 (R. 58).

2. The representation proceeding

In July 1945, the C. I. O.⁵ filed a petition with the Board alleging that a question affecting commerce had arisen concerning the representation of respondent's employees within the meaning of Section 9 (c) of the Act (R. 297-299, 509-510). Petitions alleging the same question were filed by the C. I. O. for the employees of members of the C. P. & G. and other employees in the area (R. 22-26). During July, August, and September 1945, pursuant to appropriate orders of the Board, consolidated hearings, in which the various employers, including respondent, were represented, were held on these petitions in what has come to be known as the *Bercut-Richards* case (R. 22-23, 126; *Matter of Bercut-Richards Packing Co., et al.*, 64 N. L. R. B. 133). At the hearing on the petitions, the A. F. L. contended that its existing agreements constituted a bar to the representation proceedings and urged that the Board dismiss the petitions on the ground that no question concerning representation existed. 64 N. L. R. B. 133, 135.

On October 5, 1945, the Board issued a telegraphic order directing an election in the consolidated cases. It found that the existing contracts did not constitute a bar to the representation proceedings because the contracts were to expire within a short time, and

⁵ Food, Tobacco, Agricultural and Allied Workers Union of America, C. I. O.

the residual period of the contracts was one in which canning operations would be at a low ebb and a relatively small number of employees would be working. 64 N. L. R. B. 133, 135 (R. 22-26, 126).⁶ On October 15, 1945, pursuant to the Board's order, the Regional Director conducted an election among respondent's employees in the unit found to be appropriate (R. 48-49, 126, 325). Of the 205 valid and unchallenged votes counted, 105 were cast for the A. F. L. and 100 for the C. I. O.; in addition, there were 20 challenged ballots (R. 67).

The A. F. L. filed objections to all the elections held pursuant to the *Bercut-Richards* decision, including the election held among respondent's employees (R. 48-49, 472-503). On January 16, 1946, the Regional Director issued his Report on Objections to the election (R. 354-471). On February 15, 1946, after a hearing on the objections, the Board issued a "Supplemental Decision and Order" in the consolidated cases vacating and setting aside all the elections on the ground that their results were inconclusive (R. 48-67). Since, by reason of the seasonal nature of the canning industry, it would be several months before the spring season reached its peak (R. 266-267), the Board stated that new elections would be held as early in the 1946 season as there was substantial employment, or even sooner,

⁶ The Board subsequently, on October 12, 1945, issued a formal Decision, Direction of Elections, and Order consonant with the determinations and findings made in the telegraphic decision. 64 N. L. R. B. 133.

if adequate voting lists could be prepared (R. 59, 126). The Board then declared (R. 58-59):

While we view the record as requiring this result, we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current AFL contract will expire on March 1 and since *the legal effect of the foregoing determination is to keep the question of representation pending before the Board*, none of the unions is entitled to an exclusive status as the bargaining agent after that date. In accordance with well-established principles,¹⁴ *the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved*, although they may recognize each one as a representative of its members. In this state of the record *no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date*;¹⁵ the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in sub-section 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive con-

¹⁴ See *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 163; See also *Matter of Ken-Rad Tube & Lamp Corp.*, 62 N. L. R. B. 21.

¹⁵ Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040."

ditions now existing by virtue of the foregoing agreements. [Italics supplied.]

Respondent received a copy of the Board's decision prior to March 1, 1946 (R. 251-252, 295). Nevertheless, on March 5, 1946, without any preliminary showing of majority (R. 79), respondent entered into a contract with the A. F. L. which recognized that union as the exclusive representative of all the employees in the appropriate unit and required membership in the A. F. L. by all the employees in the unit as a condition of employment (R. 127-129, 295). Specifically, the contract, of indefinite duration, required that all employees become and remain members of the A. F. L., or be discharged within 36 hours after notice to respondent of their failure to comply, and that, in the hiring of new employees, preference be given unemployed members of the A. F. L. (R. 128-129). Admittedly, respondent has enforced and given effect to this agreement since its consummation (R. 281-283).

B. The Board's decision and order

The Board found, on the facts related above, that respondent, by its grant of exclusive recognition and a closed-shop contract to the A. F. L. at a time when it knew that a representation question was pending and that it was under an obligation to refrain from throwing its economic weight to either side in the unresolved contest between the rival unions (R. 75-80) had thereby, in violation of Section 8 (1) of the Act, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

The Board's order requires respondent to cease and desist from its unfair labor practices, to cease giving effect to the closed-shop contract, to withhold exclusive recognition from the A. F. L. unless and until the A. F. L. shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 80-83).⁷

SUMMARY OF ARGUMENT

I. The Board validly found that, by granting exclusive recognition and a closed-shop contract to the A. F. L. with knowledge that a representation proceeding was then pending and unresolved, respondent interfered with the freedom of choice guaranteed its employees by Section 7 of the Act.

II. The Board's order is valid.

PRELIMINARY STATEMENT

The Board found that, by conferring exclusive recognition and a closed-shop on the A. F. L. at a time when the A. F. L.'s majority status was in question, respondent granted powerful support to the A. F. L. and thereby violated its duty to remain

⁷ The Board dismissed that portion of the complaint which alleged that respondent's conduct also constituted an independent violation of Section 8 (3) of the Act (R. 80, 83). In addition, the Board adopted the Trial Examiner's conclusion that the following allegations of the complaint be dismissed for want of substantial supporting evidence: That respondent urged, persuaded and warned its employees not to become members of the C. I. O.; demanded that they become and remain members of the A. F. L., and threatened them with discharge if they failed to do so; and granted access to its plant to representatives of the A. F. L., while refusing the same privilege to representatives of the C. I. O. (R. 74-75, 92-95).

neutral in the unresolved contest for representation between the two rival unions.

This case presents no novel questions. It is, as the Board pointed out (R. 75-77) and we shall later show, consonant with well-established doctrine long ago enunciated by the Board and uniformly approved by the courts.

ARGUMENT

POINT I

Execution of the contract of March 5, 1946, interfered with the employees' freedom of choice, in violation of Section 8 (1) of the Act

A. The Act required respondent to remain neutral in the election contest

1. *The basic doctrine of neutrality*

The Act is designed to reduce industrial strife by encouraging the making of collective bargaining agreements with unions freely chosen by a majority of the workers. Section 1. Congress sought to achieve this objective by guaranteeing to employees the fundamental right "to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer." *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; Section 7 of the Act.

It is thus accepted datum that the basic employee right of free choice, to be meaningful, must necessarily be safeguarded by a correlative duty on the part of the employer to refrain from intruding upon that freedom by the use of its economic power as an employer to assist or encourage, or to oppose or

discourage, adherence to any particular labor organization. So undeviating is this requirement of employer nonintervention that the Supreme Court early acknowledged that even "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78.

These are the fundamental, self-evident concepts of the statutes. They have been uniformly recognized and approved by the Board and the courts.

2. *Importance of neutrality in the face of an election*

The doctrine of employer neutrality assumes critical significance in the face of a pending Board election, undertaken pursuant to Section 9 (c) of the Act for the purpose of ascertaining the true preference of the employees for a bargaining representative. At such a time, to insure attainment of the statutory objective of genuine self-determination, the employer must, as the Board and the courts have so often declared, remain scrupulously aloof.

Where only one union is a candidate for the employees' favor, the contest is "rightfully one between employees," and the employer may not become a "participant in a contest to which it is not a party." *Reliance Mfg. Co. v. N. L. R. B.*, 143 F. 2d 761, 763 (C. C. A. 7) (on contempt). See also: *N. L. R. B. v. Bradley Lumber Co.*, 128 F. 2d 768, 70 (C. C. A. 8; *N. L. R. B. v. Oregon Worsted Co.*, 96 F. 2d 193, 195 (C. C. A.

9); *N. L. R. B. v. Franks Bros.*, 137 F. 2d 989, 991-992 (C. C. A. 1), affirmed 321 U. S. 702; *F. W. Woolworth Co. v. N. L. R. B.*, 121 F. 2d 658, 661 (C. C. A. 2); *N. L. R. B. v. Taylor-Colquitt*, 140 F. 2d 92, 94 (C. C. A. 4); *N. L. R. B. v. Times-Picayune Publishing Co.*, 130 F. 2d 257, 258 (C. C. A. 5); *New York Handkerchief Mfg. Co. v. N. L. R. B.*, 114 F. 2d 144, 147 (C. C. A. 7), certiorari denied, 311 U. S. 704; *Locomotive Finished Material v. N. L. R. B.*, 142 F. 2d 802, 803 (C. C. A. 10); *Peter J. Schweitzer, Inc. v. N. L. R. B.*, 144 F. 2d 520, 524-525 (App. D. C.).

So also, where the choice is to be made among several competing unions, the employer may not enter the race by according such treatment to one of the rivals as will give it either an advantage or disadvantage over the other candidates in the campaign for the employees' favor. "A fair election requires that equal opportunities be given to both [candidates]". *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 226. See also: *N. L. R. B. v. Pacific Gas & Electric Co.*, 118 F. 2d 780, 788 (C. C. A. 9); *Big Lake Oil Co. v. N. L. R. B.*, 146 F. 2d 967, 970 (C. C. A. 5); *Valley Mould & Iron Corp. v. N. L. R. B.*, 116 F. 2d 760, 764 (C. C. A. 7), certiorari denied, 313 U. S. 590; *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 860 (C. C. A. 7); *N. L. R. B. v. Stone*, 125 F. 2d 752, 756 (C. C. A. 7), certiorari denied, 63 S. Ct. 44; *N. L. R. B. v. Jahn & Ollier Engraving Co.*, 123 F. 2d 589, 592-593 (C. C. A. 7).

These are the basic principles which govern the legality of employer conduct at a time when employees are confronted with the choice of a bargaining

representative. And these are the principles which the Board held to be controlling in its determination that respondent unlawfully interfered with the freedom of choice of its employees by entering into an exclusive recognition and closed-shop contract with the A. F. L. at a time when the question of its representative status was pending and unresolved.

B. Respondent failed to observe the requisite neutrality when it entered into the contract of March 5, 1946, with the A. F. L.

When, on February 15, 1946, the Board set aside all the elections, including that held among respondent's employees, on the ground that their results were inconclusive, it specifically stated that it would hold other elections as soon as practicable and that the legal effect of its determination was "to keep the question of representation pending before the Board * * *" 65 N. L. R. B. 1052, 1057. Moreover, the Board called the attention of all the employers involved, including respondent, to the general principle that they could not, "pending a new election, give preferential treatment of any kind to any of the labor organizations involved" by renewing their existing agreement with the A. F. L., or by entering into a new, exclusive agreement with it or the C. I. O., but that they might, if they so desired, "recognize each one as the representative of its members" (*id.*).

By March 1, 1946, respondent had received a copy of the Board's decision. Nevertheless, on March 5, it entered into a contract with the A. F. L., one of the candidates in the unscheduled election, granting it not only exclusive recognition but also a closed shop for an indefinite period (*supra*, p. 6).

The Board found that, by recognizing the A. F. L. as exclusive representative at a time when its representative status was in doubt and its contest with the C. I. O. for certification as bargaining agent was unresolved, respondent granted "potent assistance" to the A. F. L. "in derogation of the right of the employees" to vote without restraint in the forthcoming election (R. 79). It found further that, by conferring upon the A. F. L. the additional advantage of a closed shop, respondent rendered "well-nigh impossible" full freedom of later choice by the employees (*ibid.*). It accordingly concluded that the execution of the contract violated Section 8 (1) of the Act. As we now show, this finding is supported by the well-established principle that an employer must maintain an attitude of neutrality in a contest between unions.

1. *Exclusive recognition may be conferred only on a union whose majority status is free from doubt*

The status of exclusive bargaining representative affords a union the unique prestige of speaking to the employer in behalf of all the employees in the unit. *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332; *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 202. Enjoyment of exclusive power to represent the interests of the employees in dealing with their employer on all problems arising out of the employment relationship necessarily places the representative in a superior position to that of all other organizations seeking the employees' favor. In making a choice as to which of two or more competing

unions to join, an employee will naturally prefer an organization with which his employer has already demonstrated a willingness to deal, rather than one whose acceptability to the employer is still speculative. And, just as naturally, an employee will be drawn to an organization which already speaks for him in its role as exclusive representative and which he therefore feels will represent his interests more effectively if he joins its rolls and contributes his financial support. The Supreme Court early recognized the value to a labor organization of exclusive bargaining status when it observed that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees". *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267. See also: *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 598.

The Act, therefore, meticulously enunciates the doctrine of majority rule and provides that the marked advantage of exclusive recognition is properly available only to a labor organization representing a real majority of the employees. Section 8 (5). Where true majority status is in doubt, the grant of exclusive recognition, as the Board and the Courts have consistently held, at once constitutes a departure from required neutrality, unlawful assistance to the union, and illegal interference with the employees' freedom of choice. *International Ass'n of Machinists v. N. L. R. B.*, 311 U. S. 72, 78-79, 81; *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 659-660 (C. C. A. 9); *N. L. R. B. v. John Engelhorn & Sons*,

134 F. 2d 553, 556 (C. C. A. 3); *N. L. R. B. v. Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C. C. A. 5); *Elastic Stop Nut Corp. v. N. L. R. B.*, 142 F. 2d 371, 380 (C. C. A. 8), certiorari denied, 323 U. S. 722. Indeed, the bestowal of exclusive representation status on one of several competing unions has been considered to be such powerful support as to mark the favorite as a company-dominated organization, which must be disestablished in order to restore the employees' freedom of choice. See, e. g., *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9).

2. *The A. F. L.'s majority status was not free from doubt; hence, the grant to it of exclusive recognition constituted unlawful assistance*

The timely filing of a petition for investigation of representatives under Section 9(c) of the Act presumptively places in doubt the representative status of any existing exclusive agent and normally requires the Board, upon a reasonable showing of substantial employee preference for a competing union, to resolve the doubt and designate the true representative. Once the Board entertains the petition, and until the question of which of the rival claimants actually represents a majority of the employees is finally settled by established Board procedures, the obligation of neutrality compels the employer to refrain from conferring exclusive recognition upon any of the contestants, or from according it treatment which is tantamount to such recognition. It can readily be seen that otherwise there cannot be a free and un-

trammelled choice in the subsequent Board election. The Board and the Courts have so held. See, e. g., *Matter of Acme Brewing Co.*, 74 N. L. R. B. No. 31; *Matter of LaSalle Steel Co.*, 72 N. L. R. B. 41; *Matter of Armour & Co.*, 72 N. L. R. B. No. 208; *Matter of Roots-Connersville Blower Corp.*, 64 N. L. R. B., 855, 859-860; *Matter of Owens-Illinois Glass Co.*, 60 N. L. R. B. 1015, 1017-1019; *Matter of Minnesota Mining & Mfg. Co.*, 61 N. L. R. B. 697, 699-701; *Matter of Waterman S. S. Co.*, 7 N. L. R. B. 237, 241-242.⁸ In conformity with this doctrine, the Board

⁸ Before the Board, respondent and the A. F. L. pointed to the Board's decisions in *Matter of American-West African Lines, Inc.*, 21 N. L. R. B. 691; *Matter of General Electric X-Ray Corp.*, 67 N. L. R. B. 997; and *Matter of Con P. Curran Printing Co.*, 67 N. L. R. B. 1419, in support of their argument that, before its decision in the instant case, the Board had not found the execution of a contract under the circumstances of this case to constitute interference with the free expression of employee choice. The cases referred to above in the text negative the contention that the doctrine was first enunciated in the instant case. Moreover, none of the three cases relied upon by respondent and the A. F. L. represents a departure from or a variance with this doctrine.

In the *American-West African* case, the Board specifically found that the employer entered into an exclusive dealing contract with one union at a time when, unlike the facts of the instant case, it had been furnished satisfactory proof of the contracting union's majority and it had no knowledge of the filing of a petition with the Board by a rival union. In the *General Electric X-Ray* case, the Board merely enunciated the rule that a bare claim of majority by a rival union, not followed within ten days by the filing of a petition with the Board, is insufficient to cast doubt upon the proven majority status of another union with whom the employer thereafter enters into an agreement. In the instant case, the doubt as to the A. F. L.'s majority status had been raised by the C. I. O.'s petition long before the contract in question was executed and was brought to the attention of respondent in the Board's decision of

has consistently held that, once representation proceedings have been set in motion, an employer and a union cannot, by entering into an exclusive dealing contract, prevent the Board from holding an election to resolve the question concerning representation. See, e. g., *Matter of St. Genevieve Lime & Quarry Co.*, 70 N. L. R. B. 1259; *Matter of Vermont Marble Co.*, 42 N. L. R. B. 185, 187; *Matter of Wolfsheim & Sachs*, 42 N. L. R. B. 232, 234; *Matter of American-West African Lines, Inc.*, 42 N. L. R. B. 1086, 1089.

One of the first cases in which the Board found that conduct tantamount to exclusive recognition of one of the candidates in the face of a pending election constituted unlawful interference with the employees' freedom of self-determination was *Matter of Waterman Steamship Corp.*, 7 N. L. R. B. 237, 241-242. There, after directing that an election be held among the shipowner's employees to determine whether they desired to be represented for collective bargaining by the A. F. L. or the C. I. O., the Board cautioned the employer not to interfere with the employees' free choice by permitting only one of the candidates access to its vessels for the purpose of talking with the employees aboard. *Matter of American France Line et al.*, 3 N. L. R. B. 64, 74, 76. The shipowner, however, in disregard of the Board's admonition, thereafter permitted only the A. F. L. representatives

February 15, 1946, three weeks before the contract was entered into. Similarly, the decision in the *Con P. Curran* case is here inapplicable. There, the Board merely followed the established doctrine, not applicable to the facts of this case, that a certification is valid for at least one year as against any rival claim made during that year.

to board the vessels and denied the same privilege to the C. I. O. on the ground that it was bound under its contract with the A. F. L. to grant that permission. In a subsequent complaint case, initiated by the C. I. O., the Board found that this disparate treatment of the two organizations, at a time when the question concerning the representation of the employees was pending and unresolved, "is obviously a discrimination in favor of the I. S. U. [A. F. L.] as against the N. M. U. [C. I. O.], which has the necessary effect of impeding its [the employer's] employees in the free choice of representatives". 7 N. L. R. B. 237, 241. The Board accordingly found that the employer's conduct violated Section 8(1) of the Act. The Supreme Court sustained the Board's finding with the observation that "if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. of L." *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 226.

The *Waterman* case thus plainly holds that the award of exclusive privileges to one of several unions competing for the employees' votes in a forthcoming election violates the employer's duty to refrain from discriminatory treatment of rivals for employee support and impedes the free exercise of employee choice. Permitting only one union to have access to the employees in the course of a pre-election campaign is no different in the prestige it bestows on the favored union and the resultant effect upon the employees

from granting to a competing union the exclusive right to have audience with the employer on behalf of all the employees in the unit. Indeed, the Board, recognizing that these related types of preferred treatment would seriously hamper its efforts to hold a free election, cautioned the employers in both the *Waterman* case and the instant case to refrain from according such preference to either candidate. And, in both cases, it found that the disparate treatment of the contesting unions constituted a violation of Section 8 (1) of the Act.

The Board's finding, that the actual grant of formal exclusive recognition to one of several competing unions pending the resolution of a question concerning representation constitutes unlawful assistance, has been upheld in the two cases involving this principle which have thus far come before the courts. *N. L. R. B. v. John Engelhorn & Sons*, 134 F. 2d 553, 556 (C. C. A. 3); *N. L. R. B. v. Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C. C. A. 5). In both these cases, the Circuit Courts sustained the Board's finding on the general well-established principle, enunciated in the *Waterman* case, that the bestowal of an exclusive privilege on one union in the face of conflicting representation claims of other unions constitutes assistance to the contracting union. In the *Southern Wood Preserving* case, after holding that the execution of an exclusive recognition agreement under these circumstances violated the neutrality requirements of the Act by according support to the contracting union,

the Court observed that "Financial support is not the only kind of support forbidden".⁹

It is thus apparent that, when respondent entered into an exclusive dealing agreement with the A. F. L.

⁹ Before the Board, respondent and the A. F. L. attempted to show that the courts, in two cases, had refused to sustain the doctrine enunciated by the Board in the instant case. But again, the reliance on these two cases is misplaced. In *N. L. R. B. v. Pacific Greyhound Lines, Inc.*, 106 F. 2d 867 (C. C. A. 9), the sole question before this Court was whether the modification of a closed-shop agreement in the face of a scheduled election constituted sufficient basis for adjudging the employer in contempt of an earlier decree issued by this Court against the employer. 91 F. 2d 458. The Board's petition for a rule to show cause why the employer should not be so adjudged was dismissed by this Court on the narrow ground of failure to state facts within the scope of the outstanding decree. This Court held that, since the new acts complained of were not of the same character as those prohibited in its decree, the controversy was one which should be determined by the Board, rather than the Court. The question of whether the continued recognition of one of the unions constituted a violation of the Act was, therefore, never decided by this Court.

Nor is *N. L. R. B. v. McGough Bakeries*, 153 F. 2d 420 (C. C. A. 5), in point. There, the question before the Court was not whether the employer committed an unfair labor practice by granting exclusive recognition and a closed-shop contract to a union at a time when a question concerning representation was pending. Although a petition had been filed by the contracting union before the execution of the contract, the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed at the time the contract was entered into. The sole issue before the Court was whether the employer had, by various forms of assistance other than the closed-shop contract, rendered the union company-dominated and whether, therefore, the closed-shop contract was invalid under the proviso to Section 8 (3) of the Act because made with an assisted union. The sole issue on review was thus whether

in the face of an unresolved dispute as to representation and with the knowledge that an election would be scheduled to settle that dispute, it unlawfully threw its economic weight in support of the A. F. L. in the forthcoming election and gave it a favored position which interfered with the free choice of its employees.

3. *The A. F. L.'s majority status was not free from doubt; hence, the grant to it of a closed shop constituted unlawful assistance*

But respondent did more than to confer upon the A. F. L. exclusive bargaining status. It armed the A. F. L. with a closed shop—the most powerful weapon for obtaining votes in the anticipated election. The contract, of indefinite duration, compelled all employees, as a condition of further employment, to become and remain members of the A. F. L. (*supra*, p. 6). It further provided that, in the hiring of new employees, preference would be given to unemployed members of the A. F. L. (*ibid.*). The A. F. L. could thus in practice pick and choose the electorate in the forthcoming election by preventing the employment of its opponents, by compelling

the employer had earlier granted such support to the contracting union as to render it company-dominated and take the closed-shop contract outside the protection of Section 8 (3) of the Act. The Court held that there was insufficient evidence to support the Board's finding of violation of Section 8 (2) and that, consequently, the contract with the union, which had a majority and which majority the Court found was uncoerced, was lawful under the proviso to Section 8 (3) of the Act and that the discharges made pursuant thereto were also proper. This case, like the *Pacific Greyhound* case, simply did not involve an adjudication of the validity of the doctrine of the instant case.

all employees to join its ranks, and by holding "in terrorem of discharge" those employees who supported its rival in the pre-election campaign. *Local 2880 v. N. L. R. B.*, 158 F. 2d 365, 368 (C. C. A. 9), certiorari granted May 6, 1947, 15 U. S. Law Week 3423.

As this Court has already held in the *Local 2880* case, enforcement of an existing closed-shop contract during a pre-election campaign constitutes unlawful interference with the employees' freedom of choice. See also: *N. L. R. B. v. American White Cross Laboratories*, 160 F. 2d 75 (C. C. A. 2). How much more corrosive of that freedom is the imposition upon the employees of a *new* closed-shop contract during such a critical period.¹⁰ For this reason, the Board has consistently condemned closed-shop contracts entered into or extended during the pendency of a question concerning representation. *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 1060, 1068-1071; *Matter of Phelps Dodge Copper Products Corp.*, 63 N. L. R. B. 686; *Matter of Abraham B. Karron*, 41 N. L. R. B. 1454, 1463-1464; see also: *Matter of Ken-Rad Tube and Lamp Corp.*, 62 N. L. R. B. 21; *Matter*

¹⁰ The Board did not consider it necessary to find that the closed-shop contract also violated Section 8 (3) of the Act, which permits the making of a closed-shop contract only with a union which actually represents a majority of the employees. It should, nevertheless, be pointed out that the courts have consistently noted that the making of such a contract with a union which does not have a true majority following constitutes powerful assistance even in the absence of an impending election. See, e. g., *N. L. R. B. v. Electric Vacuum Cleaner Corp.*, 315 U. S. 685, 695; *N. L. R. B. v. Cowell Portland Cement Co.*, 148 F. 2d 237, 242-243 (C. C. A. 9); *N. L. R. B. v. Graham Ship Repair Co.*, 159 F. 2d 787 (C. C. A. 9).

of *Southern Wood Preserving Co.*, 45 N. L. R. B. 230, 237-238, enforced 135 F. 2d 606 (C. C. A. 5); *Matter of Dominic Mcaglia & Samuel Meaglia*, 43 N. L. R. B. 1277, 1301; *Matter of Fiss Corp.*, 43 N. L. R. B. 125, 136, enforced 136 F. 2d 991 (C. C. A. 3); *Matter of Premo Pharmaceutical Laboratories*, 42 N. L. R. B. 1086, 1097, enforced 136 F. 2d 85 (C. C. A. 2); *Matter of John Engelhorn & Sons*, 42 N. L. R. B., 886, 878, enforced 134 F. 2d 533 (C. C. A. 3); *Matter of Ward Baking Co.*, 8 N. L. R. B. 558, 565-566. It should be noted that in none of these cases could the parties have been so clearly aware of the existing doubt concerning the majority status of the contracting union as they were in the instant case. Here, the Board, in its decision of February 15, 1946, specifically and officially noted that the question of which of the competing unions represented a majority of the employees was still unresolved and was still before the Board (*supra*, pp. 5-6.)

It plainly follows, as the Board found (R. 98, 74-75), that "by entering into the closed-shop contract with the A. F. L. on March 5, 1946, with knowledge of the pending proceedings for the determination of representatives, the respondent indicated its approval of the A. F. L., accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the C. I. O. and thereby rendered unlawful assistance to the A. F. L., which interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor

practices within the meaning of Section 8 (1) of the Act.”

C. Respondent is without a valid defense

1. *Inconclusive election results do not operate to restore majority status*

Before the Board, respondent and the A. F. L. sought to justify the execution of the March 5 contract by the following chain of argument: Until the representation petition was filed, the A. F. L. was the majority representative of the employees. Its majority status must, therefore, be presumed to have continued unless and until a new bargaining agent was certified. Since the first election did not result in the certification of another representative, the A. F. L. retained its status as majority representative. Consequently, when the old contract expired, respondent was obligated by Section 8 (5) of the Act to recognize and deal with the A. F. L. as exclusive representative of the employees and to enter into a contract with it.

This argument is as unsound as it is ingenious. Respondent and the A. F. L. relied on a series of cases which are here plainly inapposite. The first line of cases stands for the proposition that it is an unfair labor practice for an employer to refuse to bargain with a union which has lost its majority status by reason of the employer's earlier unlawful rejection of the union or because of other unfair labor practices. *N. L. R. B. v. Federbush*, 121 F. 2d 954, 956 (C. C. A. 2); *N. L. R. B. v. Piqua Munising Wood Products Co.*, 109 F. 2d 552, 554-555 (C. C. A. 6); *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d

652, 660 (C. C. A. 9); *Franks Bros. v. N. L. R. B.*, 321 U. S. 702. The doctrine of these cases is that, but for the employer's original wrongful refusal to bargain with the union when it did represent a majority of the employees, or his other unfair labor practices, the union would have maintained its majority following. The Board, therefore, has required the employers in cases of this type to dissipate the effects of their unfair labor practices by bargaining with the union even though it no longer commanded a majority as of the date of the Board's order. The Supreme Court, in *Franks Bros. v. N. L. R. B.*, 321 U. S. 702, 705, cited by respondent and the A. F. L., sustained as valid the Board's bargaining order in such situations on the ground that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."

The rule of these cases is simply not applicable to the facts of the instant case. Respondent did bargain with the A. F. L. for many years prior to the filing of the petition for investigation and certification of representatives, thereby according the bargaining relationship that "chance to succeed" which the *Franks Bros.* holding requires. At no time, moreover, did respondent refuse to recognize or deal with the A. F. L., or assert that it had lost its majority status. The question of whether the A. F. L. still commanded the requisite majority was raised by the C. I. O. through the appropriate statutory procedure, and not by respondent as an excuse for any refusal to bargain. The presumption of continued majority

status which the *Franks Bros.* decision recognizes is, therefore, not operative on the facts of the case at bar.

The second group of decisions with which respondent and the A. F. L. sought to support their argument similarly are not controlling on the facts of the instant case. This second line of cases supports the doctrine, established by the Board in another context, that a certification must be honored by an employer for a reasonable period, during which time the majority status of the certified union is presumed to continue and is not subject to attack. *N. L. R. B. v. Appalachian Electric Power Co.*, 140 F. 2d 217, 220-222 (C. C. A. 4); *N. L. R. B. v. Botany Worsted Mills*, 133 F. 2d 876, 881-882 (C. C. A. 3); *N. L. R. B. v. Whittier Mills Co.*, 111 F. 2d 474, 477-478 (C. C. A. 5); *Matter of Anderson Mfg. Co.*, 58 N. L. R. B. 1511, 1512-1513. It is certainly not to this context here presented that that doctrine is applicable. That doctrine stands for the proposition that *after* the doubt as to representation has been resolved by means of a validly conducted election, upon the basis of which the Board has issued a certification, the certified union must be accorded exclusive recognition for a reasonable period. This is on the theory that there must be "some measure of permanence in the results" of a validly conducted election. *N. L. R. B. v. Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542 (C. C. A. 2), certiorari denied, 323 U. S. 714, and that "freedom to choose a representative does not imply freedom to turn him out of office within the next breath" (*ibid*). The same line of cases holds that the length of time "the employees' undoubted power to recall an election

representative may be suspended, is a matter primarily, perhaps finally, for the Board'' *Century Oxford* case, *supra*, at p. 543; *Appalachian Electric Power* case, *supra*. Here the Board acted upon the fact that the A. F. L. had already enjoyed such exclusive status for a reasonable period, and the Board, by entertaining the petition for investigation and certification of representatives, determined that there was in fact a reasonable doubt as to the A. F. L.'s representative status. This doubt was made further evident by the election returns, which showed that a majority of the employees did not favor either union.

There is, therefore, no basis for the contention that an inconclusive election, particularly when it is to be followed by another vote, restores the bargaining relationship which existed before the representation proceeding was instituted. On the contrary, once a representation proceeding is set in motion, it raises and keeps alive the issue of majority representation until a conclusive election has been held and the Board has issued its findings on the final desires of the employees. *Inland Empire District Council v. Millis, et al.*, 325 U. S. 697, 707; *N. L. R. B. v. Int'l Brotherhood of Electrical Workers*, 308 U. S. 413, 414-415. In the instant case, the Board made this point clear beyond doubt when it stated in its decision of February 15, 1946, that it retained jurisdiction of the question concerning representation and that another election would be held as soon as practicable (R. 58-59).

Indeed, by recognizing the A. F. L. in the face of a pending representation proceeding before the

Board, respondent, far from complying with its obligation under the Act, arrogated to itself the function of determining the question of majority status, "which Congress entrusted to the Board alone." *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 226. Respondent, therefore, unlawfully interfered not only with the right of its employees but also with the Board's orderly processes for affording a true exercise of that right. *N. L. R. B. v. Bird Machine Co.*, decided May 20, 1947 (C. C. A. 1), 20 L. R. R. M. 2200, 2202. The vice of respondent's conduct becomes even more apparent when it is noted that respondent did not even require proof of majority from the A. F. L. before entering into the contract of March 5 and that such following as the A. F. L. had at that time could not possibly have been truly representative, for the season was then at its lowest ebb and respondent had in its employ only 70 persons, as compared with the approximately 1,200 people it employed at the height of the season (R. 266, 316).

2. *The doctrine of this case is not inconsistent with the policy of stability of bargaining relationships*

Respondent and the A. F. L. made the further related argument before the Board that the doctrine enunciated in this case is at odds with the policy of the Act, which encourages the making of collective bargaining agreements and the maintenance of stable bargaining relationships. The Board's holding in this case, they say, would deprive the employees of the right to bargain collectively during the entire interval in which the representation proceeding is

awaiting final disposition, thereby preventing effectuation of the collective bargaining policy of the Act. The short answer to this argument is that it begs the question. The right guaranteed to employees is that of bargaining collectively through "representatives of *their own* choosing." The Act does not foster or promote bargaining with a union whose majority status is in doubt. On the contrary, it recognizes that the grant of exclusive dealing rights to a non-representative agent is a prolific source of labor strife, which the unfair labor practice provisions of the Act, protecting freedom of choice, were designed to eliminate. Sections 1, 7, and 8. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45.¹¹ And Congress, when it invested the Board with exclusive power under Section 9 of the Act to resolve conflicts as to representation, was obviously mindful of the fact that it takes time for the Board to determine the question of representation and that

¹¹ *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, does not, contrary to the contention of respondent and the A. F. of L. before the Board, hold otherwise. There, the Supreme Court specifically stated that the pendency of a question concerning representation does not preclude the making of a contract with one of the competing unions *for its members only*, and not for exclusive recognition as agent for all the employees. 305 U. S. at pp. 237-238. Such a limited contract, the Supreme Court held, would not conflict with the declared policies of the Act and would not promote industrial strife. The Board, acknowledging that a contract *for members only* is permissible in the face of a pending representation proceeding, announced to the parties in its decision of February 15, 1946, that they could enter into such a limited agreement. But respondent went beyond the bounds of what was allowable by entering into not only an *exclusive recognition* agreement but also an arrangement for a closed shop.

such delay in the institution of bargaining procedures as is necessarily incidental to the prosecution of a representation proceeding is inevitable in the effectuation of the declared policy of the Act. If the contention here urged by respondent and the A. F. L. were to prevail, the aim of the Act, to vouchsafe employees the right to bargain collectively through representatives of *their own choice*, could never be realized.

Nor does it avail respondent and the A. F. L. to characterize the Board's conduct in this case as inconsistent in that the Board allegedly both honored and disregarded the declared statutory policy at two different stages in these proceedings. Before the Board, they argued that, in the original Decision and Direction of Elections, the Board acknowledged the need for permitting the old contract then in existence to operate through the end of its term, when it stated that "any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose of designating a bargaining representative to negotiate a new agreement to become effective upon the expiration of the existing contract." *Matter of Bercut-Richards et al.*, 64 N. L. R. B. 133, 135. By thus permitting the old contract to continue in effect pending the holding of the elections and the certification of bargaining representatives, they contend, the Board acknowledged that an exclusive recognition agreement would not interfere with the employees' freedom of choice. Yet, subsequently, in the instant case, their argument continues, the Board found that the execution of a new agreement almost immedi-

ately upon the expiration of the old *did* tend to hamper the free expression of the employees' desires.

Here again the answer is plain. In the first place, the Board, in its Supplemental Decision and Order of February 15, 1946, clarified the language quoted above by stating that any closed-shop features of the old contract could not be enforced as against those who supported the rival union in the election. *Matter of Bercut-Richards et al.* 65 N. L. R. B. 1052, 1958, n. 15. This is in conformity with this Court's decision in the *Local 2880* case. Secondly, the Board noted (R. 58-59) that the old contract would come to a close in a relatively short time, during which few persons would be employed by reason of the supervening slack season. Thus, the enjoyment of exclusive bargaining status under the old contract would have had little practical meaning in terms of the exertion of influence on the employees' choice. Moreover, and most importantly, the old contract was lawfully made and did not constitute assistance to the union. All employee voters were aware of its existence and knew that the election was for the purpose of selecting a bargaining representative to succeed the contracting union upon the expiration of the contract. They could, therefore, go into the election with a free choice of alternatives, knowing that their employer was not favoring the A. F. L. by merely permitting the contract to run out its term. The execution of a new contract, however, upon the expiration of the old, was bound, the Board could reasonably find, to have a different effect. Now it meant that the employer had gone beyond the requirements of the old agreement and was, of his

own accord, favoring one union over another. This lesson must have been made particularly clear by the closed-shop provision of the new contract, compelling all employees upon penalty of loss of employment to join the contracting union.

3. *Events subsequent to the date of the order and matters not raised before the Board may not be considered on review; the events relied upon are in any case immaterial*

Respondent has filed in this Court an answer and an accompanying affidavit in which its counsel now avers for the first time: (1) that the A. F. L. won an election held at respondent's plant subsequent to the date of the Board's order; (2) that the A. F. L. now threatens a strike as well as other economic reprisals if respondent should comply with the Board's order; and (3) that, if this Court should enforce the Board's order, the A. F. L. will bring about a complete shutdown of respondent's Stockton plant (R. 529-533). To support the first allegation, respondent, on February 3, 1947, filed a motion for leave to adduce as additional evidence the Board's supplemental decisions in *Matter of Bercut-Richards Packing Co., et al*, and the results of a Board election conducted at respondent's Stockton plant on August 31, 1946, after the date of the Board's order in this case. Respondent did not, however, seek to adduce any evidence as to the second and third points of its answer and accompanying affidavit. This Court granted the motion for leave to adduce but reserved judgment as to the materiality of the evidence until its consideration of the case on its merits.

We submit, first, that evidence of this character has no valid place in the record on which this case is to be decided. Evidence as to how respondent's employees voted in an election held subsequent to the Board's order does not bring before the Court the kind of matter which Section 10 (e) of the Act contemplates. It is well settled that, in a proceeding to review or enforce a final Board order, the validity of the Board's findings and order is determined on the record before the Board at the time the order was made. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *N. L. R. B. v. Newport News Shipbuilding and Drydock Co.*, 308 U. S. 241, 249-50, and cases cited, *infra*, pp. 34-35. Therefore, evidence only as to events which predated the Board's order may be considered "additional" under Section 10 (e). The Board's order is based upon its finding that respondent committed an unfair labor practice on March 5, 1946, by entering into an exclusive recognition and closed-shop contract with the A. F. L. at a time when that union's majority status was put in doubt by the pending representation proceeding. The validity of this finding and the propriety of the Board's order based thereon must be judged by the record made at the time of the order. Events which occurred after the date of the order can in no way excuse or justify such conduct in retrospect. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, *supra*; *N. L. R. B. v. American Creosoting Co.*, 139 F 2d 193, 196 (C. C. A. 6), certiorari denied, 321 U. S. 797; *Wilson & Co. v. N. L. R. B.*, 156 F 2d 577, 579 (C. C. A. 10), certiorari denied, December 9, 1946, 19 L. R. R. M. 87. It is, therefore, immaterial to the

issues on review how respondent's employees voted in an election held after execution of the contract and subsequent to the Board's order.

If the Board's finding that respondent committed an unfair labor practice on March 5, 1946, by entering into the exclusive-recognition and closed-shop contract, is valid, the Board's order is entitled to enforcement regardless of subsequent events. Section 10 (e) of the Act makes enforcement mandatory. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc., supra*. Moreover, whatever the final outcome of the second election, the Board's order is necessary to effectuate the policies of the Act by preventing respondent from engaging in similar conduct at future times when its employees may again be called upon to vote in other Board-conducted elections and by providing assurance that the Board's orderly election processes will not again be thwarted. *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 437-438; *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 226

Nor do the results of the election ^{11a} operate retrospectively to make legal conduct which was illegal at the time of its commission. The operative fact is the interference by respondent with the employees' choice by unneutral conduct at a time when two rival unions were competing for support *in an as yet uncondacted election*. The tally made *after the election* does not alter the fact that support was rendered to one of two competing unions in a

^{11a} Quite apart from the fact that objections to this last election based upon new alleged acts of interference are now under investigation by the Board.

forthcoming election. To contend, as do respondents and the A. F. L., that the election held after the making of the contract retroactively reflects the desires of the employees as of the time the contract was made, is to assume an identity of conditions at both times. This assumption completely ignores the interjection of the contract itself as a powerful factor conditioning the employees' choice.

Respondent, apparently, is relying on the affidavit annexed to its answer for evidence to support the second and third points there raised, *i. e.*, that the A. F. L. now threatens a strike if respondent complies with the Board's order, and that the A. F. L. will bring about a complete shut-down of its plant if this Court should enforce the Board's order. This method of attempting to introduce new evidence in the case is not only procedurally defective, but the new matter itself is wanting in substance. That respondent may not resort to this device to enlarge the record is well established. As this Court had occasion to state, "Such practice is not in harmony with orderly procedure." *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d 780, 784 (C. C. A. 9). In *N. L. R. B. v. Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, the Supreme Court declared (at pp. 249-250):

The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in Section 10 (e) of the Act.

Since respondent did not move the Board or this Court for leave, under Section 10 (e) of the Act, to introduce such additional evidence, the new matter may not now be considered.

Accord: *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, ³²²~~276~~; *N. L. R. B. v. Biles-Coleman Lumber Co.*, 96 F. 2d 197, 198 (C. C. A. 9); *N. L. R. B. v. Oregon Worsted Co.*, 96 F. 2d 193, 194 (C. C. A. 9); *N. L. R. B. v. Blanton Co.*, 121 F. 2d 564, 571-572 (C. C. A. 8); *Bussman Mfg. Co. v. N. L. R. B.*, 111 F. 2d 783, 788 (C. C. A. 8); *Wilson & Co. v. N. L. R. B.*, 156 F. 2d 577, 579 (C. C. A. 10), certiorari denied on December 9, 1946, 19 L. R. R. M. 87; *Southport Petroleum Co. v. N. L. R. B.*, 315 U. S. 100, 104-105.

Apart from the procedural deficiency mentioned, the claimed threat of economic reprisals by the A. F. L. is no defense for the three-fold reasons, first, that it was never urged before the Board as a defense to the making of the contract (*N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385); secondly, to build a defense upon it is to exalt, as a criterion of permitted conduct, the private convenience of the employer above the policies and plain command of the statute (*N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470);¹² and thirdly, it is

¹² Accord: *Warehousemen's Union v. N. L. R. B.*, 121 F. 2d 84, 87 (App. D. C.), certiorari denied, 314 U. S. 674; *N. L. R. B. v. Isthmian Steamship Co.*, 126 F. 2d 895, 900 (C. C. A. 2); *N. L. R. B. v. John Engelhorn & Sons*, 134 F. 2d 553, 557-558 (C. C. A. 3); *South Atlantic Steamship Co. v. N. L. R. B.*, 116 F. 2d 480, 481 (C. C. A. 5), certiorari denied, 313 U. S. 582; *N. L. R. B. v. Hudson Motor Car Co.*, 128 F. 2d 528, 532, 533 (C. C. A. 6); *McQuay-Norris Mfg. Co. v. N. L. R. B.*, 116 F. 2d 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *N. L. R. B. v. Gluek Brewing Co.*,

not a legitimate ground for withholding enforcement of an otherwise valid order. *Idaho Potato Growers v. N. L. R. B.*, 144 F. 2d 295, 307-310 (C. C. A. 9), certiorari denied, 323 U. S. 769; *N. L. R. B. v. National Broadcasting Co., Inc.*, 150 F. 2d 895 (C. C. A. 2); *N. L. R. B. v. John Engelhorn & Sons*, 134 F. 2d 553, 557-558 (C. C. A. 3); *N. L. R. B. v. Gluek Brewing Co.*, 144 F. 2d 847 (C. C. A. 8). This Court will "not assume that [the A. F. L.] will not respect its decision," and there are ample means "to enable the court to protect its order." *National Broadcasting case, supra*, at p. 900.

POINT II

The Board's order is valid

The Board's order requires respondent to cease and desist from its unfair labor practices, to cease giving effect to the illegal closed-shop contract dated March 5, 1946, to withhold recognition from the A. F. L. unless and until it shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 80-83). The validity of these provisions on the findings made is well established.¹³

et al., 144 F. 2d 847, 853-854 (C. C. A. 8); cf. *N. L. R. B. v. Remington Rand, Inc.*, 130 F. 2d 919, 936 (C. C. A. 2); *N. L. R. B. v. Goodyear Tire and Rubber Co.*, 129 F. 2d 661, 664 (C. C. A. 5).

¹³ The validity of the Board's order on the findings made is not challenged.

CONCLUSION

It is respectfully submitted that the Board's decision is reasonable in finding that respondent's conduct here in question constituted a violation of Section 8 (1) of the Act, that its order is valid, and that a decree should issue enforcing the order in full.

GERHARD P. VAN ARKEL,
General Counsel.

MORRIS P. GLUSHIEN,
Associate General Counsel.

A. NORMAN SOMERS,
Assistant General Counsel,

IDA KLAUS,
ROBERT E. MULLIN,
Attorneys,
National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act—

* * * * *

(6) The term “commerce” means trade, traffic, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement

or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings

as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

No. 11450

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL A. PORTER, Administrator, Office of Price
Administration,

Appellant,

vs.

EUGENE DASHIEL, doing business as Aluminum
Fabricators,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JAN 24 1947

PAUL P. O'BRIEN,
CLERK

No. 11450

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. 2994

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

EUGENE DASHIEL, dba ALUMINUM
FABRICATORS, LAKE GROVE, OREGON,
Defendants.

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

Comes now the plaintiff in the above entitled suit
and for cause thereof alleges:

Count One

I.

During all times herein mentioned the plaintiff
was and now is the duly appointed qualified and
acting Administrator of the Office of Price Admini-
stration of the United States of America.

II.

At all times herein mentioned the defendants
were and now are engaged in the manufacture and
sale of cast aluminum griddles having their prin-
cipal place of business at Lake Grove, in the County
of Clackamas, State of Oregon.

[Stricken by order of 2/18/46.]

IV.

Jurisdiction of this suit is conferred on this Court by Section 205(a) and Section 205(e) of the Emergency Price Control Act of 1942, as amended and extended. Pursuant to Section 4(a) of said Emergency Price Control Act of 1942 as amended and extended (Pub. L. 383, 78th Cong., 2d Sess., 57 Stat., 566 Pub. L. 108, 79th Cong. C 214, 1st Sess.) hereinafter called the "Act", there was [1*] issued MPR 188, as amended, effective in accordance with the provisions of the Act which regulation establishes and provides certain formula pricing methods for determining manufacturers' maximum prices for consumer goods other than apparel. Said Regulation provides that if the manufacturer is manufacturing commodities on which maximum prices had not been finally determined prior to August 1, 1942, and which differed from any article manufactured and sold by the manufacturer for which a maximum price had already been established, by more than minor changes in material, design, or construction, or by minor changes of material, design or construction, resulting in reduced cost of materials or any serviceability not fairly equivalent to that of the article for which a maximum price had already been established by the manufacturer, then the manufacturer is required, under Section 1499.158 of MPR 188, as amended, prior to offering such an article for sale, to submit reports to the Office of

* Page numbering appearing at foot of page of original certified Transcript of Record.

Price Administration in Washington, D. C., applying for the establishment of a maximum price, or prices, for their sales of the article. Said Regulation further provides that upon issuance of the order by the Price Administrator, or his duly authorized representative, the manufacturer may offer the article for sale in accordance with the terms of the order.

V.

In the judgment of the plaintiff, and in fact, the defendants have engaged in acts and practices which constitute violations of Section 4(a) of the Act, as amended, and extended, in that at all times between December 18, 1944, and September 11, 1945, the defendants have sold cast aluminum griddles subject to said Regulation without establishing their correct maximum price therefore, and without following the pricing practices as required by the provisions of said Regulation as hereinabove set forth, and more particularly at all times since September 12, 1945, defendants have sold cast aluminum griddles in excess of the ceiling prices established by the Administrator of Office of Price Administration, under Maximum Price Regulation 188, Order 4411 (F.R. Doc. 45-16919 filed September 11, 1945.)

VI.

During December 1944 and at all times since, defendants in violation of the provisions of said Regulation, have sold cast aluminum griddles at prices in excess of the maximum prices permitted by said MPR 188, as amended, by charging divers

customers, persons or purchasers of various classes, prices in excess of [2] the maximum prices as established by said Regulation, and the exact date thereof, the names of said customers or persons, and the amounts and extent of said overcharges, and the type and class of purchasers overcharged are at this time unknown to the plaintiff.

VII.

Defendants substantially violated the provisions of Section 4 of the Act. The issuance by the Court of an order enforcing compliance with the provisions of the Act is specifically authorized by Section 205(a) of the Act and is necessary to prevent violation and enforce compliance in the future.

Count Two

I.

Plaintiff hereby realleges paragraphs 1, 2, 3, 4, and 5 of Count I and the same are herewith incorporated by reference and made a part hereof as though they were fully set forth herein.

II.

Within one year last past the defendants sold certain cast aluminum griddles subject to said Regulation to divers customers or persons at prices in excess of the maximum prices permitted by said MPR 188, as amended. That the number of sales of said cast aluminum griddles, the exact dates thereof, the names of said customers or persons, the amounts and extent of said overcharges, and

the types and classes of purchasers overcharged are at this time unknown to the plaintiff.

III.

The transactions heretofore referred to occurred within one year immediately preceding the filing of this complaint and said sales were not made for use or consumption other than in the course of trade or business.

Wherefore the plaintiff demands:

1.—A preliminary and final injunction requiring the defendants, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, to follow the pricing practices as required by the provisions of Maximum Price Regulation 188, as amended.

2.—A preliminary and final injunction, enjoining the defendant, their agents, servants, employees, attorneys and all persons in active concert or [3] participation with them, jointly or severally, from directly or indirectly selling, or offering to sell, cast aluminum griddles at prices in excess of those established by said maximum price regulation 188, as amended, or otherwise violating, or attempting, or agreeing to do anything in violation thereof, or in violation of any regulation or order adopted pursuant to said Act establishing prices for the manufacturing and sale of cast aluminum griddles.

3.—And in addition thereto, that the number and amounts of said cast aluminum griddles sold to the divers customers, and classes and type of persons

be ascertained and determined, and that a further judgment be granted in favor of the Administrator on behalf of the United States of America against the defendants for the total sums representing treble the amount by which the consideration charged and received by the defendants exceeded the maximum prices as established under Maximum Price Regulation 188, as amended, and for costs and disbursements herein incurred.

4.—Such other further and different relief as to the court may seem just and proper in the premises.

Dated at Portland, Oregon, this 29th day of November 1945.

/s/ SOL STERN,
Enforcement Attorney,

/s/ W. A. STOCKMAN,
Enforcement Attorney,

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 29, 1945. [4]

In the District Court of the United States
for the District of Oregon

No. Civil 2994

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

EUGENE DASHIEL dba ALUMINUM
FABRICATORS LAKE GROVE, OREGON
and JOHN DOE and JANE DOE,
Defendants.

ANSWER

Comes now Eugene Dashiel, defendant above named, and answering to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

Admits paragraph I of Count I of said complaint.

II.

Answering to paragraph II, this defendant admits that he now is engaged in the manufacture and sale of cast aluminum griddles, having his principal place of business in Lake Grove, County of Clackamas, State of Oregon.

III.

Answering to paragraph III, this defendant alleges that he has no knowledge or information concerning the matters therein alleged.

IV.

This defendant admits paragraphs IV, V, and VI.

V.

This defendant denies paragraph VII.

I.

Answering to paragraph I of Count II of said complaint this defendant repeats his answers to paragraphs I, II, III, IV and V of Count I of said complaint.

II.

This defendant denies paragraphs II and III of Count II of said complaint. [5]

Wherefore, this defendant demands that plaintiff's complaint be dismissed as to this defendant, and that he may have such other and further relief as to the court may seem proper.

VEATCH & BRADSHAW,

Attorneys for defendant.

State of Oregon,
County of Multnomah—ss.

I, John C. Veatch, being first duly sworn, depose and say that I am one of the attorneys for defendant, Eugene Dashiel, dba Aluminum Fabricators, in the above entitled suit, and that the foregoing answer is true as I verily believe, and that I make

this verification for the reason that said defendant is not in Multnomah County, Oregon.

JOHN C. VEATCH.

Subscribed and sworn to before me this 2nd day of January, 1946.

ROBERT C. BRADSHAW,

Notary Public for Oregon.

My Commission expires Sept. 10, 1947.

State of Oregon,
County of Multnomah—ss.

Due service of the within Answer is hereby accepted in Multnomah County, Oregon, this 2nd day of January, 1946, by receiving a copy thereof, duly certified to as such by John C. Veatch, one of Attorneys for this answering defendant.

/s/ J. M. BLACKFORD,

Attorney for Plaintiff by
SKE.

[Endorsed]: Filed Jan. 3, 1946. [6]

In the District Court of the United States
for the District of Oregon

No. 2994

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

EUGENE DASHIEL, dba ALUMINIUM FAB-
RICATORS, LAKE GROVE, OREGON,
Defendant.

ORDER ON PRE-TRIAL

The above-entitled cause come on for hearing on pre-trial in accordance with Rule 16 of the Rules of Civil Procedure for District Courts of the United States, before Honorable James Alger Fee, Judge of said Court, and there were made

The Following Appearances: The plaintiff appeared by one of his attorneys, Don Eva, and the defendant appeared by John C. Veatch of the firm of Veatch and Bradshaw, his attorneys; and

The Court having read the pleadings and having submitted to respective counsel the opportunity of arranging a pre-trial order, and based thereon, does make the following

Findings and Order

I. Parties

The parties hereto are Chester Bowles, Administrator, Office of Price Administration, as plain-

tiff, and Eugene Dashiell, doing business as Aluminum Fabricators, as defendant.

II. Admitted Facts

1. That the Office of Price Administration was duly created by Act of Congress pursuant to Section 201(a) of the Emergency Price Control Act of 1942, and amendments or extensions thereto, and that Chester Bowles was duly appointed, qualified and acting Administrator thereof.

2. That jurisdiction of this action is conferred upon this Court by Section 205(c) and Section 205(e) of the Emergency Price Control Act of 1942, as amended and extended.

3. That the defendant, Eugene Dashiell, was and at all times herein mentioned has been engaged in the manufacture and sale of cast aluminum griddles having his principal [7] place of business at Lake Grove, in the County of Clackamas, State of Oregon.

4. Pursuant to Section 4(a) of said Emergency Price Control Act of 1942, as amended and extended (Pub. L. 383, 78th Cong., 2d Sess., 57 Stat., 566, Pub L. 108, 79th Cong., C 214, 1st Sess.) hereinafter called the "Act", there was issued MPR 188, as amended, effective in accordance with the provisions of the Act, which regulation establishes and provides certain formula pricing methods for determining manufacturers' maximum prices for consumer goods other than apparel. Said Regulation provides that if the manufacturer is manufacturing commodities on which maximum prices had not been finally determined prior to August 1, 1942, and

which differed from any article manufactured and sold by the manufacturer for which a maximum price had already been established, by more than minor changes in material, design, or construction, or by minor changes of material, design or construction, resulting in reduced cost of materials or any serviceability not fairly equivalent to that of the article for which a maximum price had already been established by the manufacturer, then the manufacturer is required, under Section 1499.158 of MPR 188, as amended, prior to offering such an article for sale, to submit reports to the Office of Price Administration in Washington, D. C., applying for the establishment of a maximum price, or prices, for their sales of the article. Said Regulation further provides that upon issuance of the order by the Price Administrator, or his duly authorized representative, the manufacturer may offer the articles for sale in accordance with the terms of the order.

5. That on September 11, 1945 ceiling prices on cast aluminum griddles manufactured and sold by Defendant were established by the Administrator of the Office of Price Administration under Maximum Price Regulation 188, Order 4411 (Federal Register Doc. 45-16919 Filed September 11, 1945).

6. That in March 1942, Inca Metals Products Co., was engaged in the general business of manufacturing and selling aluminum griddles.

7. That, if defendant is not a transferee of the business of manufacturing and selling aluminum

griddles, of Inca Metals Products Co., within the meaning of the General Maximum Price Regulation, defendant has sold and delivered aluminum griddles in excess of the maximum prices established pursuant to said Regulation.

8. That, if defendant is the transferee of Inca Metals Products Co., of the business of manufacturing and selling aluminum griddles, within the meaning of said [8] Regulation, he has not sold and delivered aluminum griddles in excess of the maximum prices established pursuant to said Regulation.

III. Contentions of Plaintiff

1. Plaintiff contends that between November 29, 1944, and September 11, 1945, defendant sold and delivered aluminum griddles without having established a maximum price therefor and in excess of the maximum prices established by said Regulation.

2. That subsequent to September 11, 1945, to and including November 29, 1945, defendant sold and delivered aluminum griddles in excess of the maximum prices established for defendant's business pursuant to said Regulation.

3. That defendant is not the transferee of Inca Metal Products Co. within the meaning of the General Maximum Price Regulation.

IV. Contentions of Defendant

1. Defendant contends that, subsequent to April 28, 1942, he purchased from Inca Metals Products

Co., the business of manufacturing and selling aluminum griddles, including all machinery for making the same, stock on hand and unfilled contracts and thereafter conducted said business in an establishment separate from any other business previously owned or operated by him.

2. That in March 1942 Inca Metals Products Co., sold and delivered aluminum griddles at the price of \$7.50 each.

3. That he has never sold or delivered any griddles in excess of the maximum price Inca Metals Products Co. received for the same in March 1942.

V. Issues of Law and Facts to Be Tried

1. Is defendant a transferee of Inca Metals Products Co. of the business of manufacturing and selling aluminum griddles within the meaning of the General Maximum Price Regulation which states as follows:

1499.5 Transfers of business or stock in trade. If the business, assets or stock in trade of any business are sold or otherwise transferred after April 28, 1942, and the transferee carries on the business, or continues to deal in the same type of commodities or services, in an establishment separate from any other establishment previously owned or operated by him, the maximum prices of the transferee shall be the same as those to which his transferor would have been subject if no such transfer had taken place, and his obligation to keep records sufficient to verify such prices shall be the same. The trans-

feror shall either preserve and make available or turn over, to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the record provisions of this General Maximum Price Regulation. [9]

2.—If defendant is not a transferee of said business, the number of sales and the amounts of the same in excess of the maximum price applicable to the same, made by defendant from the 29th day of November 1944 and the 11th day of September 1945.

3. If defendant is not a transferee of said business, the number of sales and the amounts in excess of the maximum prices established by the Price Administrator for defendant's business, made by defendant subsequent to September 11, 1945 to and including November 29, 1945.

4. At what prices or prices did the Inca Metals Products Company sell and deliver aluminum grid-dles in March 1942.

VI. Exhibits

Pltf. Deft.	Description
1	Audit of invoice of Aluminum Fabricators.
2	Audit report of R. L. Gales, Investigator, OPA.
3	Ledger of Inca Metals Products (To be produced).
4	Copy of letter Inca Metals Products Co.,

Pltf. Deft.	Description
	to Office of Price Administration, October 26, 1944.
5	Copy of letter Aluminum Fabricators to Office of Price Administration, December 11, 1944.
6	Copy of Assumed Name Certificate filed by Aluminum Fabricators in Clackamas County, Oregon.
7	Copy of order Aluminum Fabricators to Inca Metals Products Co., December 11, 1944.
8	Receipt, Inca Metals Products Co., to Aluminum Fabricators.
9	Copy of Assignment Aluminum Fabricators to Fidelity Reserve & Loan Co., March 27, 1945.
10	Letter, Aluminum Fabricators to Office of Price Administration, June 19, 1945.
11	Letter, District Price Executive to Aluminum Fabricators, June 20, 1945.
12	Letter, Aluminum Fabricators to Office of Price Administration, June 26, 1945.
13	Letter, District Price Executive to Aluminum Fabricators, June 27, 1945.
14	Letter, District Price Executive to Aluminum Fabricators, July 19, 1945.
15	Fourth Pricing Method Report, Aluminum Fabricators.
16	Letter, District Price Executive to Aluminum Fabricators, July 27, 1945.

Pltf. Deft.	Description
17	Letter, Aluminum Fabricators to Office of Price Administration, August 1, 1945.
18	Delivery receipt book of Inca Metals.

This pre-trial order is agreed to in conference in open court. The pleadings now pass out of the case and the issues are those that are herein established. This order shall not be amended after signing except by consent of the parties or by the Court to prevent manifest injustice.

Done and dated at Portland, Oregon this day of April 1946.

.....

District Judge.

Approved:

/s/ DON EVA,

Attorney for Plaintiff.

/s/ JOHN C. VEATCH,

Attorney for Defendant.

Lodged but not signed. Sub. to J. McColloch.
4/2/46. [11]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant and, by leave of court, files this, his amended answer to plaintiff's complaint, and admits, denies and alleges as follows:

I.

Admits paragraphs I, II, IV of Count I of said complaint.

II.

Denies paragraphs V, VI and VII of Count I of said complaint.

III.

Answering to paragraph I of Count II of said complaint, defendant admits and denies as in his answer to Count I.

IV.

Answering to paragraph II of Count II, defendant admits that he sold griddles subject to Maximum Price Regulation 188, but denies that he sold them in excess of the maximum prices permitted by said regulation.

V.

Admits paragraph III of Count II of said complaint.

And, for a further and separate answer and defense defendant alleges:

I.

That defendant is a sole trader doing business under the firm name and style of Aluminmu Fabricators at Lake Grove, Clackamas County, Oregon.

II.

That Inca Metals Products Co., a corporation, was engaged in the [12] general business of manufacturing and selling cast aluminum griddles in March, 1942, and sold and delivered said griddles in said month. That on October 26, 1944, said Inca Metals Products Co., pursuant to instruction from the Office of Price Administration, filed in said

office at Portland, Oregon, a schedule of its prices for cast aluminum griddles, together with its price for the month of March, 1942.

III.

That on or about the 11th day of December, 1944, defendant purchased from said Inca Metals Products Co., its business of manufacturing and selling cast aluminum griddles, together with the machinery and equipment for manufacturing the same and thereafter conducted said business in an establishment separate from any other establishment previously owned or operated by him.

IV.

That on said 11th day of December, 1944, defendant filed in the Office of Price Administration at Portland, Oregon, a notice of said purchase together with a schedule of his prices for said product.

V.

That on the 19th day of July, 1945, the District Price Executive of the Office of Price Administration at Portland, Oregon, notified defendant that unless he, the defendant, established his prices for said product under the Fourth Pricing Method of Maximum Price Regulations 188, he would become liable for all the penalties provided for in said regulation. That, pursuant to said notice and threat and not otherwise, defendant filed an application for the establishment of prices pursuant to said Fourth Pricing Method and thereafter and on the

12th day of September, 1945, issued its order numbered 4411.

VI.

That defendant has not, to his knowledge, sold and delivered any cast aluminum griddles in excess of the maximum prices established by Maximum Price Regulation No. 188. That if any of said product has been sold by defendant in excess of maximum prices established by said regulation, such sales were made through inadvertence and mistake and not wilfully by this defendant. [13]

Wherefore, defendant demands that plaintiff's complaint be dismissed and that plaintiff recover nothing herein.

VEATCH & BRADSHAW,
Attorneys for defendant.

State of Oregon,
County of Multnomah—ss.

I, Eugene Dashiell, dba Aluminum Fabricators Lake Grove, Oregon, being first duly sworn, depose and say that I am the defendant in the above entitled suit, and that the foregoing Amended Answer is true as I verily believe.

EUGENE DASHIEL,

Subscribed and sworn to before me this 8th day of April, 1946.

[Seal]

JOHN C. VEATCH,

Notary Public for Oregon.

My Commission expires 10/30/48.

State of Oregon,
County of Multnomah—ss.

Due service of the within amended answer is hereby accepted in Multnomah County, Oregon, this day of April, 1946 by receiving a copy thereof, duly certified to as such by John C. Veatch, Attorney for defendant.

/s/ DON EVA mc,
Attorney for plaintiff. [14]

[Title of District Court and Cause.]

MEMORANDUM

As I stated at the trial, I need to know what record Administrator Bowles had before him before I can determine whether the Administrator, as counsel contended, passed adversely on the defendant's claim that he had transferee rights. The defendant is therefore requested to file and serve a motion supported by affidavit showing good cause under Rule 34 for an order directing plaintiff to produce and permit the inspection and copying or photographing by or on behalf of the defendant of the record on which plaintiff based his Order (M. P. R. 188, Order 4411), more particularly described in the pleadings, proposed pre-trial order and the other prior proceedings herein, and the cause is re-opened for that purpose. Plaintiff will, of course, be given opportunity to resist the motion.

In the case of *Morgan v. U. S.* 304 U. S. 1, 17

the Secretary answered interrogatories but, recognizing that the former Administrator is very busy, the procedure here suggested is, it seems to me, less onerous on plaintiff than the interrogatory or deposition method.

In *Bowles v. West Side Lumber Co.* in this court, at my request, copies of inter-office letters and telegrams leading to the order there in question were furnished without the difficulties that are being encountered in this case.

Dated April 19, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 19, 1946. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause heretofore came regularly on for hearing before the Court sitting without a jury, a trial by jury having been waived by the parties, plaintiff appearing by Frank Harrington, who was admitted specially to the bar of this court for the purpose of appearing in this case, and Don Eva, his attorneys, and defendant appearing in person and by John C. Veatch, one of his attorneys; both oral and documentary evidence having been introduced on behalf of the respective

parties hereto and the evidence being closed, the cause was submitted to the Court for its decision and determination, and the Court, being advised in the premises, now makes the following

FINDINGS OF FACT

I.

That the plaintiff is the duly appointed and acting Administrator of the Office of Price Administration pursuant to the provisions of the Act of Congress known and designated as the Emergency Price Control Act of 1942.

II.

That the defendant is a sole trader, doing business under the firm name and style of Aluminum Fabricators, at Lake Grove, in Clackamas County, Oregon, and was and is engaged in the general business of manufacturing and selling cast aluminum griddles.

III.

That in 1942 Inca Metals Products Co., a corporation, was engaged in the general business of manufacturing and selling cast aluminum griddles at said Lake Grove, and prior to the month of March, 1942, sold and delivered [16] said griddles at the price of \$7.50 each. That said Inca Metals Products Co., was out of production for some time but resumed the manufacture and sale of griddles in 1944, and employed defendant, Eugene Dashiel as its sales manager for the sale of griddles.

IV.

That, upon resuming the manufacture of griddles, said corporation, by its president and defendant, its sales manager, called upon the local Office of Price Administration and asked for instructions as to procedure to be taken in connection with prices to be charged in the sale of griddles and was instructed to write a letter to said local office setting forth the prices to be charged. That on October 26, 1944, said corporation filed with said local office a letter setting forth that fact that its price prior to March 1942 was \$7.50 which was later reduced to \$5.00 and then to \$4.00 and then to \$3.80 for lots of 50 and that it was establishing a price of \$3.00 for lots of 400 and \$3.80 for smaller lots.

V.

That in November, 1944, defendant purchased from Inca Metals Products Co., all machinery and equipment for polishing and finishing cast aluminum griddles and completing them for sale; all griddle castings on hand and all of the unfilled orders of said corporation for griddles and moved said equipment and business to an establishment separate from the establishment of Inca Metals Products Co., and separate from any establishment previously operated by defendant and thereafter continued to manufacture and sell griddles of the same type theretofor manufactured and sold by Inca Metals Products Co. That Inca Metals Products Co., did not manufacture and sell griddles after said sale to defendant.

VI.

That, on December 11, 1944, defendant notified the local Office of Price Administration in writing that he, the defendant, had purchased from Inca Metals Products Co., said business of manufacturing and selling griddles and that his prices would be the same as theretofore charged by said corporation.

VII.

That, in June, 1945, a price specialist in the local Office of Price [17] Administration notified defendant that he, the defendant, had no legal prices for the griddles he was selling and defendant again filed with said office in writing the information that he had purchased his griddle business from Inca Metals Products Co., who was manufacturing the article prior to March, 1942, and again filed with said office the prices which he the defendant was charging.

VIII.

That on July 19, 1945, a price specialist in the local Office of Price Administration notified defendant that unless he, the defendant, filed an application under the Fourth Pricing Method of Maximum Price Regulation 188 for establishment of prices for the griddles he was selling that he, the defendant, would be subject to all of the penalties provided in the Emergency Price Control Act of 1942, and that if said local office found that he, the defendant, was selling griddles without first having so established a price that it would take enforcement action against defendant. That defendant, on

or about the 24th day of July, 1945, filed an application under said fourth pricing method under duress and under protest, claiming that he was a transferee of the business of Inca Metals Products Co., and had a legal price for the griddles he was selling under the regulations of the Price Administrator. That, pursuant to said application, order No. 4411 was issued on the 11th day of September, 1945, and that he did not waive his rights as transferee of Inca Metals Products Co.

IX.

That, when said Administrator issued Order No. 4411 he only had before him defendant's said application. That the local Office of Price Administration did not forward with said application the written or any information which defendant had filed with and furnished to said office, claiming that he, the defendant, was a transferee of the business of Inca Metals Products Co., and had a price established pursuant to the provisions of the General Maximum Price Regulations of the Office of Price Administration, and the said administrator did not know any of this.

X.

That plaintiff makes no claim that defendant is not a transferee of Inca Metals Products Co., or that said transferor did not have a legal [18] price for the griddles it was manufacturing and selling at the time of said transfer or that defendant is selling or has sold griddles in excess of the price established at the time of said transfer and prior

to March 1942 or that defendant is selling or has sold griddles which are essentially different from the griddles sold at the time of said transfer and prior to March 1942 but claims that Order No. 4411 applies to all sales made by defendant and seeks to collect damages and penalties for sales made by defendant prior to the issuance of said order as well as for sales made subsequent thereto.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I.

That the defendant is a transferee of Inca Metals Products Co., of the business of manufacturing and selling cast aluminum griddles within the meaning of sec. 1499.5 of General Maximum Price Regulations issued by the Office of Price Administration.

II.

That Inca Metals Products Co., had a legal price established pursuant to the provisions of said General Maximum Price Regulations at the time of said transfer, and prior to March 1942.

III.

That defendant has not sold any griddles in excess of the maximum price established by said Inca Metals Products Co., at the time of said transfer, and prior to March 1942.

IV.

That the provisions of said General Maximum Price Regulations and particularly sec. 1499.2 thereof apply to the sales made by defendant.

V.

That the provisions of sec. 1499.158 of Maximum Price Regulation 188, under which order No. 4411 was issued do not apply to any sales made by the defendant.

Dated this 24th day of May, 1946.

CLAUDE McCOLLOCH,
Judge. [19]

State of Oregon,
County of Multnomah—ss.

Due service of the within findings and conclusions is hereby accepted in Multnomah County, Oregon, this.....day of May, 1946, by receiving a copy thereof, duly certified to as such by John C. Veatch, Attorney for defendant.

/s/ DON EVA,
Attorney for plaintiff.

[Endorsed]: Filed May 24, 1946. [20]

[Title of District Court and Cause.]

JUDGMENT

The Court, having made and filed its findings of fact and conclusions of law herein, now therefore, by virtue of said findings and conclusions it is

Ordered, adjudged and decreed that plaintiff take nothing by this action and that defendant go hereof without day.

Dated this 3rd day of June, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 3, 1946. [21]

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTY PLAINTIFF

Comes now Paul A. Porter by his counsel and respectfully requests the Court that an order be entered herein substituting him, the said Paul A. Porter, as party plaintiff herein in the place and stead of Chester Bowles.

This motion is based upon the affidavit of Howard Bergman, one of the attorneys for plaintiff, which affidavit is hereunto attached and by this reference thereto made a part hereof, and from which it appears that the said Paul A. Porter is now the duly appointed, qualified and acting successor in office to

the said Chester Bowles as Administrator of the Office of Price Administration, that there is substantial need of continuing and maintaining this cause, and that the said Paul A. Porter has adopted and continued the action of the said Chester Bowles in continuing the enforcement of law averred in this cause to be violated.

Dated this 23rd day of August, 1946.

/s/ HOWARD BERGMAN,

One of Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 23, 1946. [22]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SUBSTITUTE PARTY PLAINTIFF

State of Oregon,
County of Multnomah—ss.

1. I, Howard Bergman, being first duly sworn depose and say:

That I am one of the attorneys for the plaintiff in the above-entitled cause and make this affidavit on behalf of Paul A. Porter, supporting his motion to be substituted as party plaintiff herein.

2. Said motion is based upon the following grounds and reasons:

a. That Chester Bowles, party plaintiff in this action, has resigned from the office of Administrator of the Office of Price Administration, and that his resignation was duly accepted and the said Paul A.

Porter, whose appointment by the President for the office of Administrator was confirmed by the United States Senate on February 21, 1946, entered upon his duties in said office on February 26, 1946. That ever since said last mentioned date the said Paul A. Porter has been and now is the duly appointed, qualified and acting Administrator of the Office of Price Administration.

b. That there is substantial need of continuing and maintaining this cause for the reason that the same relates to the present and future discharge of the Office of Price Administration and to the enforcement of the Emergency Price Control Act of 1942, as amended, and as extended and amended by the Emergency Price Control Extension Act of 1946.

c. That there is substantial need for continuing and maintaining [23] this cause for the further reason that the subject matter thereof consists of violations of the Emergency Price Control Act of 1942 as amended, averred by plaintiff to be made by defendant, and that said Paul A. Porter has adopted and continued the action of Chester Bowles in that he, the said Paul A. Porter, is continuing the enforcement of said price control act as amended and extended as aforesaid.

d. That I am informed and believe, and therefore state the fact to be that the said Paul A. Porter desires to continue this cause by appealing to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on June 3, 1946, and has directed that such appeal be taken, as appears from the dispatch from W. B. Wetherall to W. S.

Williams dated August 13, 1946, a copy of which is hereinto attached marked for identification "Exhibit A" but before taking such appeal must be substituted as party plaintiff in this cause. That immediately upon the granting of an order making such substitution due notice of appeal will be given and filed.

Dated this 23rd day of August, 1946.

/s/ HOWARD BERGMAN.

Subscribed and sworn to before me this 23rd day of August, 1946.

[Seal] /s/ RICHARD J. BURKE,

Notary Public for Oregon.

My commission expires 5/14/50.

EXHIBIT A

246 PD SF 8-13-46 418P

W. S. Williams, Actg Dist Enforcement Atty
OPA PD

Re Porter v. Dashiel dba Aluminum Fabricators.
National Office Has Instructed That Appeal Be
Taken. Accordingly, Please File Notice of Appeal
And Forward Copy To Us For Transmittal To
Washington.

W. B. WETHERALL,
Regl Litigation Atty OPA
SF DM 432P.

Certified to be a true copy.

/s/HOWARD BERGMAN. [24]

State of Oregon,
County of Multnomah—ss.

Due service of the within Motion of Substitution is hereby accepted in Multnomah County, this day of August, 1946, by receiving a copy thereof, duly certified to as such by Howard Bergman, one of Attorneys for Plaintiff.

/s/ JOHN C. VEATCH,

Attorney for Defendants. [25]

[Title of District Court and Cause.]

CONSENT TO SUBSTITUTION OF
PARTY PLAINTIFF

Comes now the above named defendant and consents that an order may be entered herein substituting Paul A. Porter, the Administrator of the Office of Price Administration as party plaintiff in the place and stead of Chester Bowles.

/s/ VEATCH & BRADSHAW,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 23, 1946.

State of Oregon,
County of Multnomah—ss.

Due service of the within Consent to Substitution is hereby accepted in Multnomah County, Oregon, this 23rd day of August, 1946, by receiving a copy thereof, duly certified to as such by Veatch & Bradshaw, Attorneys for Defendant.

/s/ HOWARD BERGMAN,

of Attorneys for Plaintiff.

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTY
PLAINTIFF

This matter coming on regularly to be heard upon motion of Paul A. Porter to be substituted as party plaintiff herein, and it appearing to the Court that ever since February 26, 1946, Paul A. Porter has been and is now the duly appointed, qualified, and acting successor in office of Chester Bowles, plaintiff herein, as Administrator of the Office of Price Administration and it satisfactorily appearing to the Court from the affidavit in support of said motion that there is substantial need for continuing and maintaining this cause, and it further appearing that said Paul A. Porter intends to and will appeal as provided by law from the judgment heretofore entered herein but must first be substituted as party plaintiff; and the Court having fully considered said motion and having found that sufficient cause exists for the granting thereof, and being at this time advised in the premises, it is therefore

Considered and Ordered that Paul A. Porter, Administrator of the Office of Price Administration be and hereby is substituted as party plaintiff in the place and stead of Chester Bowles.

Dated at Portland, Oregon this 24th day of August, 1946.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 24, 1946. [27]

In the District Court of the United States
For the District of Oregon

No. 2994

PAUL A. PORTER, Administrator, Office of
Price Administration,

Plaintiff,

vs.

EUGENE DASHIEL, doing business as ALUMI-
NUM FABRICATORS, LAKE GROVE,
OREGON, and JOHN DOE and JANE DOE,
Defendants,

NOTICE OF APPEAL

Notice is hereby given that plaintiff above-named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered herein on June 3rd, 1946.

/s/ W. A. STOCKMAN,

/s/ HOWARD BERGMAN,

Of Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

Due service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, Wednesday, this 28th day of August, 1946, by receiving a copy thereof, duly certified to as such by Howard Bergman, one of Attorneys for Plaintiff.

/s/ JOHN C. VEATCH,

Attorney for Defendant.

I hereby certify that the foregoing is a true, full and correct copy of the original Notice of Appeal.

/s/ HOWARD BERGMAN.

[Endorsed]: Filed Aug. 28, 1946. [28]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Plaintiff-Appellant, Paul A. Porter, Administrator, Office of Price Administration, hereby designates for inclusion in the record on appeal taken by Appellant from the final judgment herein, the complete record of the proceedings and evidence in the action, including, without limitation, the following:

1. Complaint
2. Answer
3. Pre-trial Order
4. Amended Answer
5. Memorandum Opinion
6. Findings of Fact and Conclusions of Law
7. Judgment
8. Transcript of Trial Proceedings, April 4, 1946
9. Motion for Substitution of Party Plaintiff
10. Consent to Substitution of Party Plaintiff
11. Order Substituting Party Plaintiff

12. Notice of Appeal
- 12½. Transcript of docket entries.
13. This Designation.

Dated at Portland, Oregon, this 3rd day of October, 1946.

HOWARD BERGMAN,
Of Attorneys for Plaintiff-
Appellant. [29]

State of Oregon,
County of Multnomah—ss.

Due service of the within Designation of Record is hereby accepted in Multnomah County, Oregon, this 3rd day of October, 1946, by receiving a copy thereof, duly certified to as such by Howard Bergman, of Attorneys for Plaintiff Appellant.

/s/ JOHN C. VEATCH,
Attorney for Defendant
Appellee.

[Endorsed]: Filed Oct. 3, 1946. [30]

[Title of District Court and Cause.]

DOCKET ENTRIES

Nov. 29, 1945—Filed complaint.

Nov. 29, 1945—Issued summons—to marshal.

Dec. 3, 1945—Filed summons with marshal's return.

Jan. 3, 1946—Filed answer of Deft. Eugene Dashiel.

Feb. 18, 1946—Record of pre-trial conference, order striking part of title and

portion of complaint, hearing continued to Feb. 25. Fee.

Feb. 25, 1946—Set for pre-trial for Mar. 4. Notice mailed.

Mar. 4, 1946—Set for pre-trial for Mar. 18. Notice mailed. Fee.

Mar. 25, 1946—Record of pre-trial—con't. to April 1. Fee.

April 1, 1946—Entered order setting for trial before court on April 4, 1946—10 a.m. McC.

April 2, 1946—Pre-trial order submitted to J. McCulloch.

April 2, 1946—Issued subpoena to Don Eva.

April 3, 1946—Filed subpoena.

April 4, 1946—Entered order allowing appearance Frank Harrington as atty. for ptff. for purposes of this case; record of trial before court, order allowing amendment of answer; order reserving motion of deft. to dismiss, argument on merits & order taking under advisement. McC.

April 8, 1946—Filed amended answer of deft.

April 19, 1946—Filed memorandum opinion. Copies to attys.

April 25, 1946—Entered order setting for further hearing on April 29, 1946—10 a. m. attys. notified McC.

April 30, 1946—Entered record for further hearing. (discussion of procedure) McC.

- May 6, 1946—Filed written opinion (Judgment for deft.).
- May 6, 1946—Entered order to prepare Findings, Conclusions & Judgment. Attys. notified. McC.
- May 10, 1946—Filed letter from O. P. A. with copies of documents.
- May 24, 1946—Filed Findings of Fact & Conclusions of Law. Notice to Attys. McC.
- June 3, 1946—Filed & entered Judgment for deft. notice to attys. McC.
- July 26, 1946—Filed transcript of trial proceedings.
- Aug. 23, 1946—Filed notice of appearance of Howard Bergman as attorney for plaintiff.
- Aug. 23, 1946—Filed consent to substitution of party plaintiff.
- Aug. 23, 1946—Filed motion for substitution of party plaintiff.
- Aug. 24, 1946—Filed & entered order substituting party plaintiff. McC.
- Aug. 28, 1946—Filed notice of appeal by plaintiff.
- Oct. 3, 1946—Filed designation of record.
- Oct. 4, 1946—Filed & entered order allowing plaintiff to Oct. 21, 1946 to file transcript on appeal. Leavy. [32]

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do

hereby certify that the foregoing pages numbered from 1 to 32 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2994, in which Paul A. Porter, Administrator, Office of Price Administration is plaintiff and appellant and Eugene Dashiel, doing business as Aluminum Fabricators, Lake Grove, Oregon and John Doe and Jane Doe, are defendants and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody, except the Order on Pre-Trial which was not filed or signed but was lodged.

I further certify that I have enclosed a duplicate transcript of trial proceedings.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 18th day of October, 1946.

(Seal) /s/ LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [32]

[Endorsed]: No. 11450. United States Circuit Court of Appeals for the Ninth Circuit. Paul A. Porter, Administrator, Office of Price Administration, Appellant, vs. Eugene Dashiell, doing business as Aluminum Fabricators, Appellee. Transcript of of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed October 21, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals in and
for the Ninth Circuit

No. 11,450.

PAUL A. PORTER, Administrator, Office of Price
Administration,

Appellant,

vs.

EUGENE DASHIEL, doing business as ALUMI-
NUM FABRICATORS, LAKE GROVE,
OREGON,

Appellee.

STATEMENT OF POINTS AND DESIGNATION
OF RECORD ON APPEAL

The following is a statement of points upon which the appellant will rely on the appeal in the above entitled matter.

1. The court erred in failing to find that the de-

defendant sold cast aluminum griddles in excess of the maximum prices established by the Administrator of the Office of Administration in Order 4411 issued under Maximum Price Regulation 188 (F. R. Doc. 45-16919, filed September 11, 1945, 10 F. R. 11729).

2. The Court erred in concluding as a matter of law that the provisions of Section 1499.158 of Maximum Price Regulation 188, under which Order No. 4411 was issued, do not apply to any of the sales made by the defendant.

3. The court erred in concluding as a matter of law that the defendant did not violate the Emergency Price Control Act of 1942, as amended, and Maximum Price Regulation 188, as amended, in making the sales complained of.

4. The court erred in denying plaintiff's prayer for injunctive relief.

5. The court erred in denying plaintiff's prayer for damages.

The appellant hereby designates the following matters to be printed for the record on appeal:

1. Complaint for injunction and treble damages.
2. Answer.
3. Amended answer.
4. Opinion.
5. Findings of fact and conclusions of law.
6. Judgment.

7. Order substituting party plaintiff.
8. Notice of Appeal.
9. Designation of record for transmittal to the Ninth Circuit Court of Appeals.
10. Order extending time for filing transcript.
11. This Statement of Points and Designation of Record on Appeal.

/s/ WILLIAM B. WETHERALL,
Regional Litigation Attorney,
Office of Price Administration,
47 Kearny Street,
San Francisco 8, California.

[Endorsed]: Filed Oct. 24, 1946.

No. 11450

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellant,

vs.

EUGENE DASHIEL, doing business as Aluminum
Fabricators,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

MAR 19 1947

No. 11450

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILIP B. FLEMING, Temporary Controls
Administrator,
Appellant,
vs.

EUGENE DASHIEL, doing business as Aluminum
Fabricators,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

In the District Court of the United States
for the District of Oregon

No. Civ. 2994

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

EUGENE DASHIEL, d/b/a ALUMINUM
FABRICATORS, Lake Grove, Oregon,

Defendant.

OPINION

Prior to the events chronicled here, Dashiell, the defendant, was employed by Inca Metals Products Corp. as sales manager. The firm manufactured aluminum griddles and had sold some before 1942 for use in CCC camps for \$7.50 each. Organizing the Aluminum Fabricators in March, 1945, Dashiell bought the griddle part of Inca's business and claims the right as transferee to charge Inca's pre-war price. However, due to increased production and sales, the present price is \$2.25 at the factory at Lake Grove, near Portland, Oregon, freight prepaid.

The Oregon District office of OPA appears to have doubted the validity of Dashiell's claim to transferee rights, and insisted, so Dashiell testified, on threat of dire measures, including prosecution, that he file for a price under the "Fourth Pricing

Method", which is the method for pricing articles that were not in use in March, 1942, or at an earlier date. This Dashiell did on July 24, 1945, without waiving his claim to transferee rights. The application was filed in the Portland, Oregon, district office of OPA, and all prior negotiations, oral as well as written, were with the district office. Dashiell's Fourth Method application was forwarded to the Price Administrator in Washington, but the prior correspondence with the district office was not forwarded, nor was any statement sent to Washington which showed that Dashiell claimed transferee rights.

Pursuant to the application, the Administrator made an order September 11, 1945, fixing the price of \$2.00 per griddle with certain variances, freight prepaid. The order, which was made retroactive, contained no reference to Dashiell's claim of transferee rights; nor, as stated, did Administrator Bowles, who signed the order, know that such claim had been made to the district office.

This action is for forty thousand dollars approximately, three times the amount of alleged overcharges (the difference between \$2.25 and \$2.00 per griddle), on sales made during the year preceding the date of filing the complaint, November 29, 1945. An injunction is also asked.

Early History of the Case

Counsel had agreed before Judge Fee on the form of a pre-trial order to the effect that the sole

question for determination was whether Dashiel had transferee rights. The day of the trial, which fell to me because of Judge Fee's absence on account of an up-State term. OPA resident counsel, a sound and trusted lawyer, asked to be relieved of the stipulation on the ground that other OPA counsel insisted that a trial as to the validity of defendant's claim to transferee rights would amount to questioning the validity of the order of September 11, 1945, contrary to Sec. 204 (d) of the Price Control Act.

I granted local counsel's request to be relieved from the stipulation, and it developed at the trial that other counsel (who was permitted to appear specially) took the position that, in making the order of September 11, the Administrator had considered and rejected defendant's claim to transferee rights.

Counsel for the defendant, on the other hand, contended that defendant was not questioning the validity of the Administrator's order. He questioned only its applicability, he said. His client, he contended, had always claimed transferee rights and had not waived the claim by applying, under duress, for a price under the Fourth Pricing Method, which applied only to new articles manufactured for the first time since 1942.

The Trial

At the trial plaintiff introduced the order of September 11, and proved by defendant that he

had made sales during the period covered by the complaint above the ceiling fixed by the order. Defendant in his own behalf testified, over objection, to the circumstances under which he acquired Inca's griddle business, claiming thereby to have acquired the right under the regulations to Inca's 1942 ceiling price.

Consistent with his revised theory of the case, plaintiff offered no testimony to dispute defendant's claim that he had acquired transferee rights and continued to insist that, whether or not the defendant was entitled to transferee rights, could not be inquired into, in view of the order of September 11, 1945.

My View

It seems plain to me that Administrator Bowles cannot be said to have passed on something, which not only was not presented to him, but about which he knew nothing. The most that has been held, in deference to the oft-repeated claim that "intolerable procedural burdens" should not be imposed on the Price Administrator, is that the Administrator need not give oral hearings, though requested, but it has not, so far as I know, ever before been urged that the Administrator could wipe out a claim on which the existence of a business depends, without at least having before him and considering the documents presented in support of the claim; and I would not expect Administrator Bowles to maintain that such had been his intention in making the order. If there were any doubt about this, I would

insist on having the Administrator's deposition taken.

Origin of This Case

I cannot leave this case without comment on its origin. It is one of a series of obviously punitive actions for which a (one time) influential source in the district OPA office is responsible, as the papers on file with us show. We have had in the court a number of cases of that origin. Nearly always the defendants were people of moderate, sometimes of small means. In all of these cases the full penalty permissible under the statute was demanded. When reasonable settlements were offered, they were rejected arrogantly. In one case a widow woman, having the added burden of a paralytic brother, was pursued relentlessly. Not only was no sympathy with the problems of the defendants ever shown, the methods employed in prosecuting the cases evinced a total lack of understanding of the principles of American justice. The cases, and others, constitute a discreditable chapter in law enforcement. They weaken the respect of the citizen for all law enforcement. They undermine the citizen's faith in his Government.

For the reasons earlier stated, judgment in this case will be for the defendant.

Dated this 6th day of May, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 6, 1946.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Opinion, in Civil 2994, Chester Bowles, Adm. OPA vs. Eugene Dashiell, d/b/a Aluminum Fabricators, Lake Grove, Oregon, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 19th day of February, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy Clerk.

[Endorsed]: No. 11450. United States Circuit Court of Appeals for the Ninth Circuit. Philip B. Fleming, Temporary Controls Administrator, Appellant, vs. Eugene Dashiell, doing business as Aluminum Fabricators, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed February 21, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,450

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellant,

vs.

EUGENE DASHIEL, doing business as Alumi-
num Fabricators,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR APPELLANT.

WILLIAM E. REMY,

Deputy Commissioner for Enforcement,

DAVID LONDON,

Director, Litigation Division,

SAMUEL MERMIN,

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FILED

FEB 27 1947

PAUL P. O'BRIEN,

CLERK

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No. 11,450

IN THE
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For the Ninth Circuit

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellant,

vs.

EUGENE DASHIEL, doing business as Alumi-
num Fabricators,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal by the Temporary Controls Administrator from a judgment of the District Court of the United States for the District of Oregon, entered June 3, 1946, giving judgment for the defendant (R. 30) in an action for statutory damages and injunctive relief, under Sections 205 (a) and (e) of the Emergency Price Control Act, as amended, 56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U.S.C. App. Supp. V, Secs. 901 et seq. (hereinafter referred to as the Act). Notice of appeal was filed by the plaintiff on August

28, 1946. (R. 36.) Jurisdiction of the District Court was invoked under Section 205 (a) and (e) of the Act (R. 3) and of this Court under Section 128 of the Judicial Code (28 U.S.C. Sec. 225).

STATEMENT OF THE CASE.

The Inca Metals Company is a manufacturer of cooking griddles. It makes its own aluminum castings and grinds and polishes them to make the finished product. The defendant, who was an employee of Inca, purchased some of their grinding and polishing equipment, and went into business for himself, purchasing castings from Inca and others, and selling them at Inca's ceiling prices.

Maximum Price Regulation No. 188¹ (hereinafter referred to as MPR 188) provided for establishment of maximum prices by reference to the base period experience of the seller. If he had sold the same or a closely similar commodity in March, 1942, his ceiling was to be the highest price charged the same class of customers at that time. If he sold a comparable commodity in the base period, a formula was provided by which the price charged for the comparable commodity could be converted to a ceiling price for the new item. If he did not sell a similar or comparable commodity, Section 1499.158 of MPR 188 provided that his price was to be one "in line with the level of Maximum Prices established by this Maximum Price Regulation No. 188," and was to be determined by

¹Applicable portions of which are reprinted, p. iv, *infra*.

the Office of Price Administration *pursuant to an application* which the seller was required to make before offering the article for sale. However, if the seller was a *transferee of the business* of one who had sold during the base period then, under Section 1499.5 of the General Maximum Price Regulation (incorporated by reference into MPR 188 by Section 1499.151 thereof), the transferor's ceiling price became that of the transferee.

The defendant had not been in business during the base period. He proceeded to sell at Inca's ceiling prices, making no application under Section 1499.158 of MPR 188 to the Office of Price Administration for a ceiling price for himself. After making many such sales, at the request of the local OPA office, he made an application, and an "in line" price was determined by the OPA and promulgated in Order No. 4411.10 Federal Register 11729, issued September 11, 1945. These prices were lower than those at which the defendant had been selling. Nevertheless, he continued to sell at higher prices, apparently contending that he was a true transferee of Inca and that he was entitled to treat Order No. 4411 as invalid and use Inca's prices as his maximum. This action was brought by the OPA for statutory damages and injunctive relief. A pre-trial order was entered into, setting forth as the principal issue in controversy the question whether the defendant was a transferee of Inca's business. At the outset of the trial, however, OPA counsel informed the Court that this understanding had been erroneous, and that the issue of whether the defendant was Inca's transferee went to the validity of

Order No. 4411, and the Court vacated the pre-trial order. (See Supplemental Record.) The defendant continued to contend that the issue of whether he was a transferee was relevant, and introduced evidence to that effect. The Court found that the defendant was such a transferee and entered judgment in his favor. From this judgment, this Appeal has been taken. In the light of the subsequent decontrol of the commodities involved, the Administrator no longer seeks injunctive relief, but desires reversal of the judgment of the Court below in so far as it denies him recovery of statutory damages, under Section 205 (e) of the Act.

SPECIFICATION OF ERRORS.

1. The Court erred in failing to find that the defendant sold cast aluminum griddles in excess of the maximum prices established by the Administrator of the Office of Price Administration in Order 4411 issued under Maximum Price Regulation 188 (F.R. Doc. 45-16919, filed September 11, 1945, 10 F.R. 11729).

2. The Court erred in concluding as a matter of law that the provisions of Section 1499.158 of Maximum Price Regulation 188, under which Order No. 4411 was issued, do not apply to any of the sales made by the defendant.

3. The Court erred in concluding as a matter of law that the defendant did not violate the Emergency Price Control Act of 1942, as amended, and Maximum

Price Regulation 188, as amended, in making the sales complained of.

4. The Court erred in denying plaintiff's prayer for injunctive relief.

5. The Court erred in denying plaintiff's prayer for damages.

ARGUMENT.

The Court below, in holding that the appellee was a transferee of the Inca Metals Company and thereby took over the ceiling prices of the latter, necessarily held invalid the Price Administrator's Order No. 4411. Maximum Price Regulation 188 authorized the issuance of individual dollars-and-cents pricing Orders only when no automatic pricing methods, dependent on base period sales prices, could be used. If the appellee could use the base prices of Inca as his ceiling, the Regulation did not authorize the issuance of Order No. 4411. If so, that Order is invalid.² But any determination by the Court below that Order No. 4411 was invalid was beyond the jurisdiction of that Court. Section 204(d) of the Emergency Price Control Act denies jurisdiction to consider the validity of pricing Regulations or orders to any Court other than the Emergency Court of Appeals. *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660; *Bowles v. Willing-*

²The OPA does not concede that the appellee is the transferee of Inca. It is prepared to introduce evidence establishing its position—but not before a court without jurisdiction to resolve the issue upon which that evidence bears, namely, the validity of Order 4411.

ham, 321 U.S. 503, 64 S. Ct. 641; *Taylor v. United States*, 142 F. (2d) 808 (C.C.A. 9), cert. denied, 323 U.S. 723, 65 S. Ct. 56; *Rosensweig v. United States*, 144 F. (2d) 30 (C.C.A. 9), cert. denied, 323 U.S. 764, 65 S. Ct. 117; *Taylor v. Bowles*, 147 F. (2d) 824 (C.C.A. 9).

The appellee contended in the Court below that Order No. 4411 was not applicable. This Order, however, was directed specifically to the defendant and covered the precise articles involved in this action. There was no room for interpretation of the Order or for any contention of inapplicability,³ and in fact the Court below did not hold it to be inapplicable but nevertheless declined to enforce it. Such a refusal to enforce Order No. 4411 is of course tantamount to a declaration of its invalidity. If a Court were empowered to ignore or refuse to give effect to an applicable order, the exclusive jurisdiction provisions of Section 204 (d) of the Act would be meaningless.

Nor can the incidence of Order No. 4411 be evaded in the guise of declaring Section 1499.158 of MPR 188, pursuant to which it was issued, inapplicable. Where an enforcement action is based directly on the Regulation, its interpretation and applicability are of course matters for the enforcement Court; but where

³A similar attempt to evade the exclusive jurisdiction provisions of Section 204 (d) of the Act was rejected by the Circuit Court of Appeals for the Fourth Circuit in *Bowles v. American Brewery Co.*, 146 F. (2d) 842, as follows: "It is argued that the Regulation should be construed as not *applicable* to malt syrup. * * * Since the Regulation covers all commodities not excepted from its provisions and malt syrup is not excepted, the question raised by this argument is simply whether the regulation is *valid* as applied to malt syrup, a question of which the Emergency Court of Appeals has exclusive jurisdiction." (Italics supplied.)

the claim is based upon sales in excess of prices established by an Order issued *under* the Regulation, the interpretation of only the Order is before the Court. The applicability of the Regulation under which the Order is issued is not a question for the enforcement Court to consider, for if that Court determines that the Regulation is inapplicable, it must perforce declare the Order to be invalid. Section 204 (d) is as applicable to issues of whether Order No. 4411 was authorized by MPR 188 as it is to questions of the statutory or constitutional validity of either Order No. 4411 or MPR 188. *Martini v. Porter*, 157 F. (2d) 35 (C.C.A. 9), petition for certiorari filed December 23, 1946; *Porter v. Senderowitz*, F. (2d), 4 OPA Op. & Dec. 2482 (C.C.A. 3, Aug. 19, 1946), petition for certiorari filed Nov. 8, 1946; *Porter v. Eastern Sugar Associates*, (2d), 5 OPA Op. & Dec. 2186 (C.C.A. 4, Jan. 6, 1947).

In *Porter v. Eastern Sugar Associates*, *supra*, an individual pricing Order, quite similar to Order No. 4411 in the instant case, was not applied by the District Court in a treble-damage action, on the ground that the clause of the General Maximum Price Regulation pursuant to which the Order had been issued was not applicable to Puerto Rico, where the sale in question had taken place. This decision was reversed on appeal, the Circuit Court of Appeals for the Fourth Circuit holding that this determination of inapplicability of the basic Regulation constituted an invalidation of an individual pricing order (which specifically covered a Puerto Rico transaction), and that this was a determination beyond the competence

of the District Court. An analogous situation is one in which it is claimed that the statute itself is inapplicable though the Regulation is clearly applicable. There too, it has been held that this contention raises a question of the validity of the Regulation (i.e., its authorization under the Statute) within the meaning of Section 204 (d). As the Supreme Court has said, the Court in an enforcement suit "would not pass on the statutory authority of the Administrator to promulgate the Regulation." (*Case v. Bowles*, 327 U.S. 92, 98, 66 S. Ct. 438, 441.) The Circuit Court of Appeals for the Fifth Circuit similarly observed: "The further contention is made that Texas is not bound to yield to the Regulation because the underlying Act of Congress does not apply to it. This seems to be the equivalent of saying that the Regulation is invalid * * *" *Bowles v. Texas Liquor Control Board*, 148 F. (2d) 265, 266 (C.C.A. 5). See also, to the same effect: *Bowles v. Wheeler*, 152 F. (2d) 34, 38 (C.C.A. 9), cert. denied 326 U.S. 775, 66 S. Ct. 265 (whether the Act "applied" to certain log booming and rafting services); *Cullen v. Bowles*, 148 F. (2d) 621, 624 (C.C.A. 2) (whether the Act "applied" to a Chapter X bankruptcy trustee); *Reeves v. Bowles*, 151 F. (2d) 16 (App. D. C.), cert. denied, 326 U.S. 781, 66 S. Ct. 336 (whether the exemption in the Act for common carriers "applied" to certain taxicab companies).

Likewise, the Emergency Court of Appeals itself has held, where an individual order under one section of a Regulation was attacked on the ground that a prior, automatic section of the Regulation applied in-

stead, that such attack raised an issue of the validity of the individual order, so as to come within its jurisdiction over that issue under Section 204 (d). *Pacific Gas Co. v. Bowles*, 153 F. (2d) 453. And that Court has similarly held that where it is contended that the general Regulation does not apply to a given product, this raises an issue of the validity of the specific Order issued under the Regulation, and hence confers jurisdiction under Section 204 (d) upon that Court. *Conklin Pen Co. v. Bowles*, 152 F. (2d) 764.

In short, when an OPA enforcement action is based upon the claim that sales were made at prices in excess of those determined directly by a section of a Maximum Price Regulation, the construction and applicability of that Regulation are matters for the determination of the enforcement Courts, though its validity is not. But where an individual maximum pricing order has been issued pursuant to a section of a Regulation, which section does not itself establish dollars-and-cents maximum prices but calls for their determination in dollars and cents only by means of the individual Order, it is only the Order itself which may be interpreted, and the Court may not consider the applicability of the Regulation under which it was issued, if the effect thereof will be to declare the individual Order invalid.

CONCLUSION.

The appellee sold at prices which uncontroverted evidence showed to be higher than those designated as maximum prices in an Order specifically applicable

to his sales. The Emergency Price Control Act confers a right in the Administrator to damages based upon such overceiling sales. The Court below refused to award such damages. To carry out the mandate of the Act, it is respectfully submitted that the judgment of the Court below must be reversed.

Dated, February 24, 1947.

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(Appendix Follows.)

Appendix.

Appendix

STATUTES AND REGULATIONS INVOLVED.

1. The Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App. Supp. V. Secs. 901 *et seq.*).

Section 204(d):

* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 205(e):

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than

in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge; or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.*³¹ For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.³² If any person selling a

³¹As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

³²Added by sec. 108 (b) of Stabilization Extension Act of 1944.

commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action*, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.³³ [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall

³³As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

“* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.”

*be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendments shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]*³⁴

2. Maximum Price Regulation No. 188, as amended through September 11, 1945 (10 F. R. 9109) :

§ 1499.151 *Applicability of the General Maximum Price Regulation.* The provisions of §§ 1499.1 to 1499.3, inclusive, and § 1499.18, of the General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain consumers' goods set forth in § 1499.166, Appendix A, of this Maximum Price Regulation No. 188. All other sections of the General Maximum Price Regulation, together with existing and subsequent amendments and supplementary regulations, shall apply to sales and deliveries by such manufacturers, and are hereby incorporated by reference into this Maximum Price Regulation No. 188.

§ 1499.152 *Prohibition against dealing in certain articles of consumers' goods above maximum prices.* (a) On and after August 1, 1942, regardless of any contract or other obligation:

(1) No manufacturer of an article set forth in Appendix A (§ 1499.166) of this Maximum Price Regulation No. 188 shall sell or deliver such article

³⁴Sec. 108 (c) of Stabilization Extension Act of 1944.

at a price higher than the maximum price permitted by the Maximum Price Regulation No. 188:

* * * * *

(c) On and after August 1, 1942, no manufacturer shall sell (including an offer for sale) or deliver any article set forth in Appendix A (§ 1499.166) of this Maximum Price Regulation No. 188 for which a maximum price must be determined under §§ 1499.156, 1499.157, or 1499.158 until he has complied with the reporting and waiting provisions of the applicable one of those three sections.

* * * * *

§ 1499.154 *Maximum prices for articles of consumers' goods not finally priced before August 1, 1942.* This section shall apply to articles first offered for sale before August 1, 1942, for which no maximum price was finally determined, and to all articles first offered for sale on or after August 1, 1942.

The maximum price for any such article shall be the price determined by the first one of the four methods set forth in §§ 1499.155, 1499.156, 1499.157, and 1499.158 which applies to the article.

(Section 1499.155 establishes the first pricing method, to be used where minor changes are not of sufficient importance to affect the maximum;

Section 1499.156 establishes the second pricing method, which provides for changes necessitated by shortages of materials or parts;

Section 1499.157 establishes the third pricing method, which provides for pricing by comparable articles.)

§ 1499.158 *Fourth pricing method; specific authorization by the Office of Price Administration—*

(a) *Maximum prices.* The maximum price for any article which cannot be priced under any of the preceding pricing methods of this regulation shall be the price in line with the level of maximum prices established by this regulation fixed by the Price Administrator or his duly authorized representative. The maximum price will be fixed by an order establishing a maximum price or a method of determining maximum prices.

The order may also establish maximum prices for sales of the article by persons other than the manufacturer. Maximum prices so established for sales by persons other than the manufacturer supersede maximum prices fixed by other regulations for such sales.

(b) *Reports of maximum prices.* Prior to offering such an article for sale, the manufacturer shall submit a report in duplicate applying for the establishment of a maximum price or prices for his sales of the article. In the case of consumers' durable goods listed in paragraph (b) of Appendix A (§ 1499.166), the manufacturer shall submit the report to the District Office of the Office of Price Administration having jurisdiction over the area in which his principal place of business is located.

The report shall contain a description in detail of the article (including the manufacturing process), a statement of the facts which make it necessary to price the article under this section, and the proposed maximum price together with the facts which support the proposed maximum price. If the manufacturer applies for approval of a pricing formula for a line or group of related articles, he shall also include a statement of the pricing formula he proposes for such articles, and the reasons why such a pricing formula will establish maximum prices in line with the level of maximum prices established by this regulation.

The manufacturer shall also submit a sample of the article being priced, if practicable. The sample should not be forwarded, however, until the manufacturer has been advised where to send it. If it is not practicable to submit a sample, the manufacturer shall submit with his application in lieu of a sample, a photograph, blueprint, or other illustration of the article being priced. In addition, the manufacturer shall submit such other relevant information to supplement his report as the Office of Price Administration may require.

Upon issuance of the order by the Price Administrator or his duly authorized representative, the manufacturer may offer the article for sale in accordance with the terms of the order.

[Above two paragraphs amended by Am. 63, 10 F.R. 8699, effective 7-17-45.]

In the case of an article for which a maximum price must be determined under this section for a sale to the United States Government or an Allied Government, the manufacturer shall submit the report required in the above paragraph of this paragraph (b) ten days after the formation of the contract. The manufacturer may at any time offer for sale, sell, or deliver the article at a tentative price, to such government or agency if he informs the purchaser that the maximum price must be determined under this section. In such case he must refund any amounts collected in excess of the price so determined. The price shall remain tentative until the maximum price has been determined in the manner provided in this regulation.

* * * * *

§ 1499.162 *Enforcement.* (a) Persons violating any provisions of this Maximum Price Regulation No. 188 are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price Control Act of 1942.

* * * * *

1499.163 *Definitions.* (a) When used in this Maximum Price Regulation No. 188, the term:

* * * * *

(2) "Highest price charged during March 1942" means

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March 1942, the highest price charged by the seller during March 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers:

* * * * *

§ 1499.166 *Appendix A: Articles covered by the regulation.* The following articles of consumer goods shall be covered by this Maximum Price Regulation No. 188:

* * * * *

(8) Commercial kitchen equipment. Commercial and industrial kitchen equipment, irrespective of the type of fuel used, for use in hotels, restaurants, schools, hospitals, industrial and public cafeterias, and similar establishments including:

Ranges.

Broilers, including salamanders and combination types.

Automatic deep fat fryers.

Bain maries.

Roasting ovens.

Baking ovens (sectional and cabinet types).

Baker stoves.

Steam jacketed kettles.

Stock kettles (electric).

Vegetable steamers—commercial.

Steam tables.

Warming ovens.

Plate warmers.

Hot plates.

Griddles.

Automatic egg broilers.

Coffee urns and coffee-making systems.

Toasters—commercial (gas).

Toasters—commercial, over 2 slices (electric).

Dishwashers—commercial.

Glasswashers—commercial.

Silver burnishers.

Mixers.

Choppers.

Slicing machines.

Potato peelers.

Coffee grinders—commercial.

Chopping blocks.

Pot racks.

Pot sinks and vegetable sinks.

Canopies.

Etc.

3. General Maximum Price Regulation (7 F.R. 3153).

§ 1499.5 Transfers of business or stock in trade. If the business, assets or stock in trade of any business are sold or otherwise transferred after April 28, 1942, and the transferee carries on the business, or continues to deal in the same type of commodities or services, in an establishment separate from any other establishment previously owned or operated by him,

the maximum prices of the transferee shall be the same as those to which his transferor would have been subject if no transfer had taken place, and his obligation to keep records sufficient to verify such prices shall be the same. The transferor shall either preserve and make available, or turn over, to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the record provisions of this General Maximum Price Regulation.

4. Order No. 4411 (10 F.R. 11729).

[MPR 188, Order 4411]

ALUMINUM FABRICATORS

Approval of Maximum Prices

For the reasons set forth in an opinion issued simultaneously herewith and filed with the Division of the Federal Register, and pursuant to § 1499.158 of Maximum Price Regulation No. 188; It is ordered:

(a) This order establishes maximum prices for sales and deliveries of certain articles manufactured by Aluminum Fabricators, P. O. Box 463, Lake Grove, Oreg.

(1) For all sales and deliveries to the following classes of purchasers by the sellers indicated below, the maximum prices are those set forth below:

<u>Maximum prices for sales by any seller to—</u>						
	<u>Model No.</u>	<u>Distribu-</u> <u>tors</u>	<u>Whole-</u> <u>salers</u>	<u>Chain &</u> <u>Dept. Stores</u>	<u>Other</u> <u>Retailers</u>	<u>Consu</u>
Alum-	F.	Each	Each	Each	Each	Each
griddle		\$1.80	\$2.00	\$2.40	\$2.67	\$4.00

These maximum prices are for the articles described in the manufacturer's application dated July 24, 1945.

(2) For sales by the manufacturer, the maximum prices apply to all sales and deliveries since Maximum Price Regulation No. 188 became applicable to those sales and deliveries. These prices are f.o.b. factory subject to a cash discount of 2% for payment within 10 days, net 30 days.

(3) For sales by persons other than the manufacturer, the maximum prices apply to all sales and deliveries after the effective date of this order. Those prices are subject to each seller's customary terms and conditions of sale on sales of similar articles.

(4) If the manufacturer wishes to make sales and deliveries to any other class of purchaser or on other terms and conditions of sale, he must apply to the Office of Price Administration, Washington, D. C. under the Fourth Pricing Method. § 1499.158 of Maximum Price Regulation No. 188, for the establishment of maximum prices for those sales, and no sales or deliveries may be made until maximum prices have been authorized by the Office of Price Administration.

(b) The manufacturer shall attach a tag or label to every article for which a maximum price for sales to consumers is established by this order. That tag or label shall contain the following statement:

Model No. F
OPA Retail Ceiling Price \$4.00
Do Not Detach

(c) At the time of, or prior to, the first invoice to each purchaser for resale, the seller shall notify the purchaser in writing of the maximum prices and conditions established by this order for sales by the purchaser. This notice may be given in any convenient form.

(d) This order may be revoked or amended by the Price Administrator at any time.

(e) This order shall become effective on the 12th day of September 1945.

Issued this 11th day of September 1945.

CHESTER BOWLES

Administrator.

[F.R. Doc. 45-16919; Filed, Sept. 11, 1945; 11:11 a.m.]

No. 11454

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. P. BONHAM, District Director, Immigration
and Naturalization Service,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED

JAN 24 1947

PAUL P. O'BRIEN,

CLERK

No. 11454

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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TOM A. DURHAM,

Attorneys for Appellant,

1012 U. S. Court House,

Seattle, Washington.

JOHN CAUGHLAN,

Attorney for Appellee,

817 Smith Tower,

Seattle, Washington.

LEO LEVENSON,

Attorney for Appellee,

Spalding Building,

Portland, Oregon. [1*]

* Page numbering appearing at top of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington,
Northern Division

No. 1589

In the Matter of the Application of
HELENE EMILIE BOUISS,
Plaintiff,
vs.

GEORGE W. TYLER, acting United States Dis-
trict Director of Immigration,
Defendant.

PETITION FOR WRIT OF
HABEAS CORPUS

To the Honorable Judges of the District Court of
the United States, for the Western District of
Washington, Northern Division.

Comes now John A. Bouiss, a citizen of the
United States of America, and the lawful husband
of plaintiff herein, for and on behalf of plaintiff
and petitioner, and respectfully shows the Honor-
able Judges of the above entitled court the follow-
ing:

I.

That plaintiff above named, is now unlawfully
detained, imprisoned and restrained of her liberty
by, and under the direction and control of defendant
George W. Tyler, acting United States District
Director of Immigration, at the Immigration Sta-

tion in the City of Seattle, Washington, and within the jurisdiction of the above entitled court.

II.

That plaintiff is a woman whose mother was a Japanese national and whose father was a German national; that she is the lawful wife of an American Citizen, the said petitioner John A. Bouiss, having entered into a contract of marriage with the said John A. Bouiss on the high seas on May 9th, 1946, aboard the United States War Shipping Administration [2] vessel, "Stetson Victory"; that at the time of her marriage plaintiff was lawfully aboard said vessel, in passage to the United States, and being in possession of a Swedish passport.

III.

That the alleged cause or pretense for the restrain and detention of plaintiff is, to the best of petitioner's knowledge, information and belief, as follows:

That upon arrival in the United States at the port of entry, Seattle, Washington, plaintiff was taken into custody by defendant or officers of the United States Immigration Service acting under his direction and orders and placed in custody at said Immigration station; that an inquiry was held by a Board of Special Inquiry of the United States States Immigration Service at Seattle, Washington, hearings being held on May 12, May 16th, and May 20th, 1946, and that on June 19th, 1946, the order of said Board of Special Inquiry excluding plaintiff

from the United States was approved by the Board of Immigration Appeals, and an order was issued excluding plaintiff from the United States solely on the ground that plaintiff is an alien ineligible to citizenship.

IV.

That said exclusion order, and the detention of plaintiff by defendant and his agents, is unlawful, null and void, in that plaintiff is the lawful wife of a citizen of the United States, and that as such is lawfully admissible to the United States as a non-quota immigrant, under the provisions of subdivision (a) of Section 4 of the Immigration Laws, which provide that the terms non-quota immigrant means "an immigrant who is . . . the wife . . . of a citizen of the United States" and plaintiff not being subject to any exception thereof.

Wherefore, petitioner prays that a Writ of Habeas [3] Corpus be granted herein, and issue out of this court, directing said George W. Tyler, defendant, and commanding that he produce the body of said plaintiff before this court at a time and place in such writ specified, then and there to do what shall be ordered by this court with respect to the detention and restraint of plaintiff and petitioner further prays that plaintiff be speedily freed of her unlawful restraint and granted liberty from her unlawful detention.

Dated at Seattle, Washington this 5th day of July, 1946.

JOHN A. BOUISS,
Petitioner.

JOHN CAUGHLIN,
LEO LEVENSON,
Attorneys for Plaintiff and
Petitioner.

United States of America,
Western District of Washington—ss.

John A. Bouiss, being first duly sworn, on oath deposes and says, that he is the petitioner above named, that he has read the same, knows the content thereof, and that the same is true, to his best knowledge and belief.

JOHN A. BOUISS.

Subscribed and sworn to before me this 5th day of July, 1946.

JOHN CAUGHLAN,
Notary Public for Wash-
ington.

[Endorsed]: Filed July 5, 1946. [4]

[Title of District Court and Cause.]

AMENDED PETITION FOR WRIT OF
HABEAS CORPUS

To the Honorable Judges of the District Court of
the United States, for the Western District of
Washington, Northern Division.

Comes now John A. Bouiss, a citizen of the
United States of America, and the lawful husband
of plaintiff herein, for and on behalf of plaintiff
and petitioner, and files this first Amended Petition
and respectfully shows the Honorable Judges of
the above entitled court the following:

I.

Petitioner is a United States citizen having an
honorable discharge certificate from the armed
forces of the United States and having served in
the army during the Second World War.

II.

That plaintiff above named, is now unlawfully
detained, imprisoned and restrained of her liberty
by, and under the direction and control of defend-
ant George W. Tyler, acting United States District
Director of Immigration, at the Immigration Sta-
tion in the City of Seattle, Washington, and within
the jurisdiction of the above entitled court.

III.

That plaintiff is a woman whose mother was a
Japanese national and whose father was a German
national; that she is [5] the lawful wife of an

American Citizen, the said petitioner John A. Bouiss, having entered into a contract of marriage with the said John A. Bouiss on the high seas on May 9th, 1946, aboard the United States War Shipping Administration vessel "Stetson Victory"; that at the time of her marriage plaintiff was a national of the country of Sweden and was lawfully aboard said vessel, in passage to the United States, and being in possession of a Swedish passport.

IV.

That the alleged cause of pretense for the restrain and detention of plaintiff is, to the best of petitioner's knowledge, information and belief, as follows:

That upon arrival in the United States at the port of entry, Seattle, Washington, plaintiff was taken into custody by defendant or officers of the United States Immigration Service acting under his direction and orders and placed in custody at said Immigration station; that an inquiry was held by a Board of Special Inquiry of the United States Immigration Service at Seattle, Washington, hearings being held on May 12, May 16th, and May 20th, 1946, and that on June 19th, 1946, the order of said Board of Special Inquiry excluding plaintiff from the United States was approved by the Board of Immigration Appeals, and an order was issued excluding plaintiff from the United States solely on the ground that plaintiff is an alien ineligible to citizenship.

V.

That said exclusion order, and the detention of plaintiff by defendant and his agents, is unlawful, null and void, in that plaintiff is the lawful wife of a citizen of the United States, and that as such is lawfully admissible to the United States as a non-quota immigrant, under the provisions of subdivision (a) of Section 4 of the Immigration Laws, which provide [6] that the term non-quota immigrant means "an immigrant who is . . . the wife . . . of a citizen of the United States" and plaintiff not being subject to any exception thereof. Petitioner further alleges that by virtue of Public Law 271 79th Congress of the United States, Chapter 591, 1st Session, alien spouses of United States citizens who have been honorably discharged from the armed forces in Second World War shall be admitted to the United States, and plaintiff not being subject to any exception thereof.

Wherefore, Petitioner prays that a Writ of Habeas Corpus be granted herein, and issue out of this court, directing said George W. Tyler, defendant, and commanding that he produce the body of said plaintiff before this court at a time and place in such writ specified, then and there to do what shall be ordered by this court with respect to the detention and restraint of plaintiff and petitioner further prays that plaintiff be speedily freed of her unlawful restraint and granted liberty from her unlawful detention.

Dated at Portland, Oregon, this 9th day of July, 1946.

/s/ JOHN A. BOUISS,

Petition.

LEO LEVENSON,

JOHN CAUGHLAN,

Attorneys for Plaintiff and
Petitioner.

State of Oregon

County of Multnomah—ss.

John A. Bouiss, being first duly sworn, on oath deposes and says, that he is the petitioner above named, that he has read the same, knows the content thereof, and that the same is true, to his best knowledge and belief.

/s/ JOHN A. BOUISS.

Subscribed and sworn to before me this 9th day of July, 1946.

[Seal] /s/ LEO LEVENSON,

Notary Public for Oregon. My commission expires 4/14/50.

[Endorsed]: Filed July 12, 1946. [7]

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

On reading and filing the petition on behalf of Helene Emilie Bouiss, duly signed and verified by petitioner, John A. Bouiss, the husband of said plaintiff, wherein it appears that she is unlawfully imprisoned and restrained of her liberty by, and

under the direction of, George W. Tyler, acting United States District Director of Immigration at the Immigration Station, within the jurisdiction of the above entitled court, and stating that said restraint and detention is unlawful in that plaintiff is the lawful wife of an American citizen, namely the petitioner, John A. Bouiss, and from which it appears that the court should grant a hearing on said petition for a writ of habeas corpus. Now Therefore,

It Is Hereby Ordered that said George W. Tyler, acting United States District Director of Immigration, appear before the Hon. Paul McCormick, District Judge, at the United States Courthouse in the City of Seattle, Washington, on Monday, the 8th day of July, 1946, at 10:00 o'clock in the forenoon, then and there to show cause why a writ of habeas corpus should not issue and said plaintiff restored to her liberty, and to do and receive what shall then and there be considered concerning the said Helene Emilie Bouiss, together with the cause of her detention; and

It Is Further Ordered that service of this rule to show cause be made forthwith upon the said George W. Tyler, acting Director of Immigration, and [8] upon the United States District Attorney for the Western District of Washington.

Dated at Seattle, Washington, this 5th day of July, 1946.

/s/ LLOYD L. BLACK,

United States District Judge.

Presented by:

/s/ LEO LEVENSON,
Attorney.

/s/ JOHN CAUGHLAN,
Attorney.

[Endorsed]: Filed July 5, 1946. [9]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

To the Honorable Paul J. McCormick, Judge of the
District Court of the United States for the
Western District of Washington.

Comes now John P. Boyd, Chief, District Adjudications Division, Immigration and Naturalization Service, Department of Justice, Seattle, Washington, for and on the behalf of the respondent, Geo. W. Tyler, Acting District Director, Immigration and Naturalization Service, Department of Justice, Seattle, Washington, and for answer and return to the Order to Show Cause herein entered, certifies and shows to this Court that the said Helene Emilie Bouiss was detained by this respondent at the time she arrived in the United States at the port of Seattle, Washington, to wit, on the 12th day of May, 1946, on the SS "Stetson Victory", as an alien person of mixed blood not entitled to admission into the United States under the laws of the United States, pending a decision on her application for admission; that thereafter, to wit, on

the 13th day of May, 1946, the said petitioner was accorded a hearing before a legally constituted Board of Special Inquiry at the United States Immigration Station, Seattle, Washington, and hearing being continued or reopened from May 13 to May 15, 16, and 20, 1946; resulting in the alien's application for admission into the United States being denied by said Board of Special Inquiry, for the reasons that she was found to be an immigrant alien not in possession of a valid immigration visa, and as an alien ineligible to citizenship and not entitled to enter the United States under any exception of Paragraph (c), Section 13, of the Immigration Act of 1924. The said Helen Emilie Bouiss appealed from the decision of the Board of Special Inquiry to the Attorney General at Washington, D. C.; on June 10, 1946, the Commissioner of Immigration and [10] Naturalization at Philadelphia, Pennsylvania, entered a memorandum decision ordering that the said excluding decision of the Board of Special Inquiry be affirmed, solely on the ground that under Section 13(c) of the Act of May 26, 1924, as amended, the petitioner is inadmissible to the United States, in that she is an alien ineligible to citizenship and not entitled to enter the United States under any exception of said subsection; that thereafter the said order was approved by the Board of Immigration Appeals, Washington, D. C.; since the final decision of the Board of Immigration Appeals, this respondent has held, and now holds and detains, the said Helene Emilie Bouiss for deportation from the United States as an alien of mixed blood, ineligible

to citizenship, not entitled to admission into the United States under the laws of the United States, and subject to deportation under the laws of the United States.

The certified record of the Department of Justice in the matter of the application of Helene Emilie Bouiss for admission into the United States is attached hereto and made a part and parcel of this Return, as fully and completely as though set forth herein in detail.

Wherefore, respondent prays that the petition for a Writ of Habeas Corpus be denied.

/s/ JOHN P. BOYD. [11]

United States of America,
Western District of Washington,
Northern Division—ss.

John P. Boyd, being first duly sworn, on oath deposes and says: That he is the Chief, District Adjudications Division, Immigration and Naturalization Service, Seattle, Washington and represents the Respondent named in the foregoing Return; that he has read the foregoing Return, knows the contents thereof, and believes the same to be true.

/s/ JOHN P. BOYD.

Subscribed and sworn to before me this 9th day of July, 1946.

[Seal] /s/ MILDRED GROGAN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed July 10, 1946. [12]

United States District Court, Western District of
Washington, Northern Division

No. 1589

MEMORANDUM OF RULING AND ORDER
GRANTING WRIT OF HABEAS CORPUS
RELEASING HELENE EMILIE BOUISS
FROM THE CUSTODY OF IMMIGRATION
AUTHORITIES OF THE UNITED STATES.

In the Matter of the Petition of Helene Emilie
Bouiss for a Writ of Habeas Corpus.

McCormick, District Judge:

John A. Bouiss, a citizen of the United States and the holder of an honorable discharge certificate from the armed forces of the Nation for service in the Second World War, petitions for the Writ of Habeas Corpus to release his lawful wife from the custody of the Immigration Officers by whom she is detained for deportation.

The writ is sought upon the ground that the detention of Mrs. Bouiss is unlawful in that she is the lawful wife of the petitioner and that as such she is lawfully admissible to the United States as a non-quota immigrant pursuant to Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U.S.C.A., Section 232, and under Section 4(a) of the Immigration Act of 1924.

The detained alien has been by the Immigration authorities precluded from entering the United

States with her husband, who was returning from overseas military duty in Japan, upon the sole ground that she is "ineligible to citizenship."

The position of the Government is based entirely upon a generalized phrase in the Act of December 28, 1945, *supra*, which limits the application of its privileges and [13] preferences to alien spouses or alien children of the service men "if otherwise admissible under the Immigration laws." And it is asserted that as Mrs. Bouiss is a person of mixed racial bloods, being one-half White and one-half Japanese, proscribed by regulations duly promulgated by the Commissioner of Immigration and Naturalization, Title 8, Regulations 350.1, 350.2, Racial Limitations upon Naturalization as of March 1, 1944, and thus ineligible to citizenship, she is also to be excluded from entering the United States under the provisions of Subsection (c) of Section 13 of the Immigration Act of 1924, Title 8, Section 204(c) U.S.C.A.

When consideration is given to the definition of a non-quota immigrant in Section 4(a) of the Immigration Act of 1924, Mrs. Bouiss, even though ineligible to naturalization, is admissible to the United States as a non-quota immigrant. This section reads:

"Non-quota Immigrant Defined. * * * The term 'Non-quota Immigrant' means — (a) An Immigrant who is the unmarried child under twenty-one years of age, or the wife, or the husband, of a citizen of the United States: Provided, That the

marriage shall have occurred prior to issuance of visa and, * * *."

No question is raised as to the marital or health status of Mrs. Bouiss upon her arrival with her husband at Seattle, Washington. Her marriage to the petitioner took place on the high seas enroute to the United States and it occurred prior to the issuance of the visa.

But even if it be held that under the restrictive literal terms of Section 13(c) of the Immigration Act of 1924, 8 U.S.C.A. 213(c) and in line with the decision of the Supreme Court in *Chang Chan v. Nagle*, 268 U.S. 346, [14] (1925), the wife of the petitioner should be excluded from the United States, we think that such conclusion is unwarranted if the patent purpose of the whole of the Act of December 28, 1945 is given consideration.

This remedial statute was enacted in a post-bellum environment which found millions of the personnel of the armed forces of the Nation in distant and widely separated foreign areas around the globe. Its broad and comprehensive terms clearly state the purpose and object which Congress sought to accomplish by this legislative innovation. The intent to keep intact all conjugal and family relationships and responsibilities of honorably discharged service men of the Second World War is clearly expressed, and the obvious purpose to safeguard the social and domestic consequences of marriage of service men while absent from the United States must take precedence over a generalized

phrase which if interpreted along purely racial lines would frustrate the plain purpose of the whole statute. Such a construction should not be adopted.

See *Holy Trinity Church v. United States*, 143 U.S. 457; *Ozawa v. United States*, 260 U.S. 178 at page 194; *Cabell v. Markham*, (C.C.A.2, 1945), 148 F. 2d 737; *United States v. 21 Pounds 8 Ounces of Platinum* (C.C.A. 4, 1945), 147 F. 2d, 78.

It follows that the writ of habeas corpus should issue to release Helene Emilie Bouiss from the custody of the respondent Acting District Director, Immigration and Naturalization Service, Department of Justice, Seattle, Washington, and It Is So Ordered.

Dated July 25, 1946.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed July 25, 1946. [15]

United States District Court, Western District of
Washington, Northern Division

No. 1589

In the Matter of the Petition of

HELENE EMILIE BOUISS, for Writ of
Habeas Corpus.

HELENE EMILIE BOUISS,

Petitioner,

vs.

GEORGE W. TYLER, Acting District Director,
Immigration and Naturalization Service, Se-
attle, Washington,

Respondent.

ORDER AND WRIT

This matter having come on before the under-
signed judge of the U. S. District Court, upon the
petition of John A. Bouiss, citizen of the United
States, and honorably discharged veteran of the
U. S. armed forces, said petition having been filed
on the 5th day of July, 1946, and upon the amended
petition of said petitioner, filed on the 9th day of
July, 1946, for writ of habeas corpus to release
his lawful wife, Helene Emilie Bouiss from custody
of respondent, George W. Tyler, Acting District
Director of Immigration, and the Hon. Lloyd L.
Black, U. S. District Judge of the above entitled
district, having on the 5th day of July, 1946 issued

a rule to show cause, returnable before the undersigned District Judge on the 8th day of July, 1946, requiring respondent to show cause why the said Helene Emilie Bouiss should not be released from custody;

Petitioner and Helen Emilie Bouiss being represented by Leo Levenson of Portland, Oregon, and John Caughlan of Seattle, Washington; respondent being represented by Charles [16] Dennis, U. S. District Attorney, and Tom A. Durham, Assistant U. S. District Attorney, and John P. Boyd, Esq.; and respondent having made and filed his return to said rule to show cause on the 10th day of July, 1946, and the undersigned judge of the above entitled court having considered the briefs of respective counsel filed herein and said return, and it appearing that the said Helene Emilie Bouiss is the lawful wife of an honorably discharged service man who served in World War II, the marriage of the parties having occurred on the high seas while petitioner was in the armed forces, and prior to the issuance of a visa, and the court having on the 25th day of July, 1946 made and filed its memorandum of ruling and order granting writ of habeas corpus, releasing Helene Emilie Bouiss from custody of immigration authorities of the United States, now therefore,

It Is Ordered that Helene Emilie Bouiss be and she is hereby discharged and released from the custody of respondent, George W. Tyler, Acting District Director of Immigration, and from any cus-

tody, control, or detention of the immigration authorities of the United States, and

It Is Further Ordered that respondent, George W. Tyler, Acting District Director of Immigration, may appeal from this order and writ of habeas corpus within thirty days of the entry thereof.

Exception to this order by respondent is hereby granted.

Dated this 29th day of July, 1946.

Approved as to form.

TOM A. DURHAM,
Asst. U. S. Atty.

Presented by:

JOHN CAUGHLAN,
One of the attorneys for
petitioner.

PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed July 29, 1946. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. P. Bonham, District Director, Immigration and Naturalization Service, appellant, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the

Order and Writ of Habeas Corpus entered in this action on July 29, 1946.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ TOM A. DURHAM,
Assistant United States
Attorney.

Received a copy of the within notice this 13th day of August, 1946.

JOHN CAUGHLAN,

By G.M.G.

Attorney for Petitioner.

[Endorsed]: Filed August 13, 1946. [18]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

I.

The Court erred in holding and deciding that a Writ of Habeas Corpus be awarded to the petitioner herein.

II.

The Court erred in holding, deciding and adjudging that the petitioner, Helene Emilie Bouiss, be discharged from the custody of respondent, Acting District Director, Immigration and Naturalization Service, Department of Justice, Seattle, Washington.

III.

The Court erred in deciding, holding and adjudging that petitioner, Helene Emilie Bouiss, even though ineligible to naturalization, was admissible to the United States as a non-quota immigrant under Section 4(a) of the Immigration Act of 1924.

IV.

The Court erred in deciding, holding and adjudging that the petitioner, Helene Emilie Bouiss, was admissible to the United States under Public Law 271, 79th Congress, Chapter 591, first section, approved December 28, 1945, 8 U.S.C. Section 232.

Received a copy of the within Assignment of Errors this 11th day of October, 1946.

JOHN CAUGHLAN,

One of the Attorneys for
Petitioner.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ TOM DURHAM,

Assistant United States
Attorney.

[Endorsed]: Filed Oct. 17, 1946. [19]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
FOR FILING RECORD ON APPEAL AND
DOCKETING THIS CASE IN THE CIR-
CUIT COURT OF APPEALS.

It is hereby stipulated by and between the parties
hereto that the time for filing the record on the
appeal and for the docketing of the above case shall
be extended to October 31, 1946.

J. CHARLES DENNIS,
United States Attorney,

TOM A. DURHAM,
Assistant United States
Attorney.

JOHN CAUGHLAN,
One of the Attorneys for
Petitioner.

[Endorsed]: Filed Sept. 12, 1946. [20]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
CASE IN CIRCUIT COURT OF APPEALS.

This matter having come on to be heard before
this court upon the stipulation of the parties hereto
by their respective counsel for the extension of time
for filing the record on appeal and for docketing

the above case in the Circuit Court of Appeals, and the stipulation being on file herein, and the court being fully advised in the premises; now therefore, it is hereby

Ordered that the time for filing the record on appeal in this cause and docketing the above action in the Circuit Court of Appeals is hereby extended to October 31, 1946.

Dated this 16th day of September, 1946.

PAUL J. McCORMICK,
U. S. District Judge.

Presented by:

TOM A. DURHAM,
Asst. U. S. Attorney.

Approved as to Form:

JOHN CAUGHLAN,
Attorney for Petitioner.

[Endorsed]: Filed Sept. 17, 1946. [21]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMISSION OF ORIGINAL RECORD

It is hereby stipulated by and between counsel for petitioner and for the District Director, Immigration and Naturalization Service, Seattle, Washington, that the certified Immigration file and rec-

ords of the Department of Justice covering the exclusion proceedings against the petitioner, which were filed with the Return of the District Director of Immigration to the Order to Show Cause, may be transmitted with the appellate record in this case, and may be considered by the Circuit Court of Appeals in lieu of a certified copy of said Immigration files and records of the Department of Justice.

/s/ JOHN CAUGHLIN,
Attorney for Petitioner.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ TOM A. DURHAM,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 17, 1946. [22]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL
RECORD

Upon stipulation of counsel, it is by this court Ordered, and the Court does hereby order, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Justice, covering the exclusion proceedings against the petitioner, which was filed with the Return of the District Director of Immigration to the Order to Show

Cause, directly to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done in open court this 18th day of October, 1946.

PAUL J. McCORMICK,
U. S. District Judge.

Received a copy of the within order this 16th day of October, 1946.

JOHN CAUGHLIN for
JOHN CAUGHLAN &
LEO LEVENSON,
Attorneys for Petitioner.

TOM A. DURHAM,
Asst. U. S. Atty.,
Atty. for Respondent.

[Endorsed]: Filed Oct. 19, 1946. [23]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-entitled Court:

The respondent, George W. Tyler, Acting District Director, Immigration and Naturalization Service, Seattle, Washington, hereby designates the entire record in this case to be contained in the record

on appeal, more particularly enumerated as follows:

- (1) Petition for Writ of Habeas Corpus.
- (2) Order to Show Cause.
- (3) Return to Order to Show Cause.
- (4) Certified Immigration file and records of the Department of Justice covering the exclusion proceedings against the petitioner.
- (5) Memorandum of Ruling and Order Granting Writ of Habeas Corpus.
- (6) Order and Writ of Habeas Corpus.
- (7) Notice of Appeal.
- (8) Statement of Points to be Relied Upon by Petitioner on Appeal.
- (9) Stipulation for Extension of Time for Filing Record on Appeal and Docketing this Case in Circuit Court of Appeals.
- (10) Order Extending Time for Filing Record on Appeal and Docketing Cause in Circuit Court of Appeals.
- (11) Stipulation for Transmission of Original Record.
- (12) Order for Transmission of Original Record.
- (13) This Designation.

J. CHARLES DENNIS,
United States Attorney.

TOM A. DURHAM,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 17, 1946. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered 1 to 25, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, except as to the record in the Immigration and Naturalization Service, Department of Justice, the original of which is enclosed herewith as part of the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [26]

Clerk's fees, for making record, certificate or return:

5 Pages at 40c	\$2.00
19 Pages at 10c (Copies Furnished)	1.90
Notice of appeal	5.00
<hr/>	
Total	\$8.90

I further certify that the foregoing fees have not been paid for the reason that the appeal herein is being prosecuted by the United States Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 19th day of October, 1946.

(Seal)

MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy. [27]

[Endorsed]: No. 11454. United States Circuit Court of Appeals for the Ninth Circuit. R. P. Bonham, District Director, Immigration and Naturalization Service, Appellant, vs. Helene Emilie Bouiss, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 24, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11454

R. P. BONHAM, District Director, Immigration
and Naturalization Service, Seattle, Washing-
ton,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

NOTICE OF POINTS ON WHICH APPEL-
LANT INTENDS TO RELY ON APPEAL

Notice Is Hereby Given that the above-named appellant intends to rely on the following points in prosecuting his appeal on the Order and Writ of Habeas Corpus awarded the above-named appellee by the United States District Court for the Western District of Washington:

1. That the United States District Court for Western District of Washington erred in holding and deciding that a writ of habeas corpus be awarded to the above-named appellee.

2. That said Court erred in holding, deciding and adjudicating that the appellee Helene Emilie Bouiss be discharged from the custody of the Acting District Director, Immigration and Naturalization Service, Department of Justice, Seattle, Washington. [29]

3. That the United States District Court for the Western District of Washington erred in deciding, holding and adjudicating that the appellee Helene Emilie Bouiss even though ineligible to naturalization was admissible to the United States as a non-quota immigrant under Sec. 4(a) of the Immigration Act of 1924.

4. That the United States District Court for the Western District of Washington erred in deciding, holding and adjudicating that the appellee Helene Emilie Bouiss was admissible to the United States under Public Law 271, 79th Congress, Chapter 591, First Section, approved Dec. 28, 1945 (8 U. S. C. Sec. 232).

/s/ CHARLES DENNIS,
United States Attorney.

/s/ TOM A. DURHAM,
Assistant United States
Attorney.

Received a copy of the within Notice of Points this 30th day of October, 1946.

/s/ JOHN CAUGHLAN,
One of the Attorneys for
Appellee.

[Endorsed]: Filed Nov. 4, 1946. [30]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
UPON APPEAL TO BE PRINTED

To the Clerk of the Above-entitled Court:

The appellant, R. P. Bonham, District Director,
Immigration and Naturalization Service, Seattle,
Washington, hereby designates the entire transcript
of record as certified to you to be printed in its
entirety as the record on appeal in the above-entitled
Cause.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ TOM A. DURHAM,
Assistant United States
Attorney.

Received a copy of the within Designation this
30th day of October, 1946.

/s/ JOHN CAUGHLAN,
One of the Attorneys for
Appellee.

[Endorsed]: Filed Nov. 4, 1946. [31]

At a Stated Term, to wit: The October Term
1946, of the United States Circuit Court of Appeals
for the Ninth Circuit, held in the Court Room
thereof, in the City and County of San Francisco,
in the States of California, on Monday, the second

day of December in the year of our Lord one thousand nine hundred and forty-six.

Present:

Honorable Francis A. Garrecht, Senior Circuit Judge, Presiding;

Honorable Clifton Mathews, Circuit Judge;

Honorable Albert Lee Stephens, Circuit Judge.

[Title of Cause.]

ORDER SUBMITTING MOTIONS FOR SUBSTITUTION TO DISMISS APPEAL, AND GRANTING MOTION FOR SUBSTITUTION AND DENYING MOTION TO DISMISS

Ordered motion of appellee to dismiss appeal herein, and motion for substitution of party appellant presented by Mr. Thomas Durham, Assistant United States Attorney, counsel for appellant, and by Mr. Leo Levenson, counsel for appellee, and submitted to the court for consideration and decision.

Upon consideration thereof, Further Ordered that the motion to dismiss be, and hereby is denied, and that the motion for substitution of R. P. Bonham, District Director, Immigration and Naturalization Service, Seattle, Washington, as party appellant in the place and stead of George W. Tyler, Acting District Director, Immigration and Naturalization Service, Seattle, Washington, be, and hereby is granted, and said R. P. Bonham, District Director, be, and he hereby is substituted as party appellant.

No. 11454

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration
and Naturalization Service,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE PAUL J. McCORMICK, *Judge*

BRIEF FOR APPELLANT

J. CHARLES DENNIS,
United States Attorney,

JOHN E. BELCHER,
Assistant United States Attorney,

JOHN P. BOYD,
Immigration & Naturalization Service
(On the Brief).
Attorneys for Appellants

OFFICE AND POSTOFFICE ADDRESS:
1020 U. S. COURT HOUSE,
SEATTLE 1, WASHINGTON

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FEB 18 1947

PAUL P. O'BRIEN

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration
and Naturalization Service,
Appellant,
vs.

HELENE EMILIE BOUISS,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE PAUL J. McCORMICK, *Judge*

BRIEF FOR APPELLANT

J. CHARLES DENNIS,
United States Attorney,

JOHN E. BELCHER,
Assistant United States Attorney,

JOHN P. BOYD,
Immigration & Naturalization Service
(On the Brief).
Attorneys for Appellants

OFFICE AND POSTOFFICE ADDRESS:
1020 U. S. COURT HOUSE,
SEATTLE 4, WASHINGTON

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration
and Naturalization Service,
Appellant,
vs.

HELENE EMILIE BOUISS,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE PAUL J. McCORMICK, *Judge*

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from an order granting a Writ of Habeas Corpus. The appellee, HELENE EMILIE BOUISS, now forty years of age, was born in Kobe, Japan, on March 11, 1906, and is one-half blood of the Japanese race and one-half blood of the white race; her mother having been of the Japanese race and her father of the German race. Appellee has resided in Japan her entire life, and is presently a citizen of Sweden, having acquired Swedish nationality through

marriage to a Swedish subject, John Walgren Wilson, on May 9, 1925. This marriage was terminated by divorce September 14, 1937. On May 9, 1946, en route from Japan to the United States, appellee was married on the high seas to John Anthony Bouiss, a citizen of the United States, then serving in the Armed Forces of the United States. Upon arrival at the port of Seattle, Washington on May 12, 1946, appellee was removed to the Immigration Station where she was accorded a hearing before a legally constituted Board of Special Inquiry. Based upon the evidence adduced at said hearing, the appellee's application for admission to the United States was denied by said Board of Special Inquiry for the reason that she was found to be an immigrant alien not in possession of a valid immigration visa, and an alien ineligible to citizenship, and not entitled to enter the United States under any exception of paragraph (c), Section 13 of the Immigration Act of 1924. The appellee appealed from this decision of the Board of Special Inquiry to the Attorney General of the United States, and on June 10, 1946, the Commissioner of Immigration and Naturalization at Philadelphia, Pennsylvania, acting for and on behalf of the Attorney General, entered a Memorandum Decision ordering that the said excluding decision of the Board of Special Inquiry be affirmed, solely on the ground that under Section 13(c)

of the Act of May 26, 1924, as amended, the appellee is inadmissible to the United States, in that she is an alien ineligible to citizenship, and not entitled to enter the United States under any exception of said subsection. Thereafter, the record was forwarded to the Board of Immigration Appeals, and the order of the Commissioner of Immigration and Naturalization of June 10, 1946, was entered and approved by the Board of Immigration Appeals.

The appellee, through her husband John Anthony Bouiss, thereafter applied to the District Court of the United States for the Western District of Washington, Northern Division, for a Writ of Habeas Corpus, alleging in general terms that the exclusion order, and her detention by the Immigration authorities, was unlawful, null and void, in that as the lawful wife of a citizen of the United States, serving in the Armed Forces of the United States she is lawfully admissible to the United States as a non-quota immigrant under Section 4(a) of the Immigration Act of 1924, and by virtue of Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U. S. C. A., Section 232.

On July 29, 1946, the said District Court for the Western District of Washington, Northern Division, granted the Writ and ordered that the appellee be dis-

charged and released from any custody control, or detention of the Immigration authorities of the United States.

ERRORS ASSIGNED

The court erred:

1. In holding and deciding that a writ of Habeas Corpus be awarded to the appellee, Helene Emilie Bouiss.

2. In holding, deciding and adjudging that the appellee, Helene Emilie Bouiss, be discharged from the custody of appellant.

3. In deciding, holding and adjudging that the appellee, Helene Emilie Bouiss, even though ineligible to naturalization, was admissible to the United States as a non-quota immigrant under Section 4(a) of the Immigration Act of 1924.

4. In deciding, holding and adjudging that the appellee, Helene Emilie Bouiss, was admissible to the United States under Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U.S.C. Sec. 232.

LAW AND AUTHORITIES

Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8, U.S.C.

Section 232, provides for the admission to the United States of alien spouses and alien children of United States citizens serving in, or having an honorable discharge certificate from the Armed Forces of the United States during the second World War under certain conditions, if otherwise admissible under the Immigration laws, and reads as follows:

“Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, *if otherwise admissible under the Immigration laws* and if application for admission is made within three years of December 28, 1945, be admitted to the United States: Provided, That every alien of the foregoing description shall be medically examined at the time of arrival in accordance with the provisions of section 152 of this title, and if found suffering from any disability which would be the basis for a ground of exclusion except for the provision of sections 232-236 of this title, the Immigration and Naturalization Service shall forthwith notify the appropriate public medical officer of the local community to which the alien is destined: Provided, further, That the provisions of sections 232-236 of this title shall not affect the duties of the United States Public Health Service so far as they relate to quarantinable diseases.” (Italics supplied)

Section 4(a) of the Immigration Act of 1924, 8 U.S.C. 204, provides for the non-quota status of the unmarried children, the wife, or the husband of a citizen of the United States, and reads as follows:

“When used in this Act the term ‘non-quota immigrant’ means—

(a) An immigrant who is the unmarried child under twenty-one years of age, or the wife, or the husband, of a citizen of the United States: Provided, That the marriage shall have occurred prior to issuance of visa and, in the case of husbands of citizens, prior to July 1, 1932.”

Section 13(c) of the Immigration Act of 1924, 8 U.S.C. 213, provides that no alien ineligible to citizenship shall be admitted to the United States with certain exceptions, and reads as follows:

“No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.”

Section 28(c) of the Immigration Act of 1924, as amended, 8 U.S.C. 224, is descriptive of the term “ineligible to citizenship”, and reads as follows:

“The term ‘ineligible to citizenship’, when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under section 303 or 306

of the Nationality Act of 1940, as amended (54 Stat. 1140, 1141; U.S.C., Title 8, Secs. 703, 706), or section 3(a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845; U.S.C., Title 50, App. Supp. III), section 303 (a), or under any law amendatory of, supplementary to, or in substitution for, any such sections."

Section 303 of the Nationality Act of 1940, 8 U.S.C. 703, defines those racially eligible to become naturalized, and provides in part as follows:

"The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, descendants of races indigenous to the the Western Hemisphere, and Chinese persons or persons of Chinese descent . . .".

Part 350, Title 8, Code of Federal Regulations, promulgated by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, under the authority contained in Section 327, 54 Stat. 1150 (8 U.S.C. 727) reads in part as follows:

" . . . Persons of mixed racial bloods.

A person of mixed racial bloods, to be eligible to naturalization within the limitations of § 350.1¹ of this part, must be — (a) a person who is of as much as one-half blood of the white race,

¹ 350.1 "Racial eligibility; general classes. Except as otherwise provided in this Part, naturalization under the provisions of the Nationality Act of 1940 is limited to white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent . . ."

African nativity or descent, a race indigenous to the Western Hemisphere, or a combination of any such races, and is *not of as much as one-half blood of any other race or combination of races.*" (Italics supplied)

Section 17 of the Immigration Act of February 5, 1917 (8 U.S.C. 153), provides that Boards of Special Inquiry shall have authority to determine whether applicants shall be allowed to land or shall be deported, and that " . . . In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereinafter made, the decision of the Board of Special Inquiry adverse to the admission of such alien shall be final unless reversed on appeal to the Attorney General . . ."

ADMINISTRATIVE FINDINGS AND CONCLUSIONS

The findings, conclusions and exclusion order of the local Board of Special Inquiry are shown on pages 30-31, and 34 of the certified record of the Immigration and Naturalization Service, Exhibit Number 56171/680. The findings, conclusions and order of the Commissioner of Immigration and Naturalization entered and approved by the Board of Immigration Appeals, Washington, D. C., affirming the excluding decision of the Board of Special Inquiry on the ground

that the alien is ineligible to citizenship, are contained in the same Exhibit, and are quoted below:

“File: 56171/680 — Seattle (1200-15858)

In re: HELENE EMILIE BOUISS alias AIDO
AJUMA nee WAGENKNECHT formerly
WILSON

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPELLANT: No one

EXCLUDED: Act of 1924 — No immigration
visa
— Ineligible to citizenship

APPLICATION: Admission for permanent residence

DISCUSSION: The appellant is a 40-year-old married female, who was excluded by a Board of Special Inquiry at the port of Seattle, Washington, on May 20, 1946, on the grounds above mentioned and who appealed.

The appellant is a native of Japan and a subject of Sweden by a previous marriage. Her father was a full-blooded German and her mother, a full-blooded Japanese. She has lived in Japan all her life. She applied for repatriation to Sweden as a ‘recovered civilian’ and while en route was married on May 9, 1946, on the high seas to a person who testified that he is a citizen of the United States and that he has been a member of the armed forces of the United States during World War II. He further testified that he expected to be discharged on May 17 or May 18, 1946 (p. 19). She arrived in the United States at the port of Seattle, Washington, on May

12, 1946, via the SS 'Stetson Victory' and applied for admission for the purpose of remaining permanently. She is not in possession of an immigration visa (pp. 2, 3, 4, 5, 6, 25, 26).

The record does not show whether the appellant's husband has been discharged from the Army and, if so, whether he has been honorably discharged. However, since she is excludable as an alien ineligible to citizenship and is detained at steamship expense, rather than to reopen to bring the record up-to-date, it will be assumed that her husband has been honorably discharged. Accordingly, the appellant is exempt from the documentary requirements under Public Law 271, approved December 28, 1945, and the documentary ground of exclusion is not sustained.

FINDINGS OF FACT: Upon the basis of all the evidence, it is found:

- (1) That the appellant is an alien, a native of Japan and a subject of Sweden;
- (2) That the appellant is of mixed blood, being of fifty percent of the white race and fifty percent of the Japanese race;
- (3) That the appellant is the spouse of a citizen of the United States, who has served honorably in the Armed Forces of the United States during World War II;
- (4) That the appellant arrived in the United States at the port of Seattle, Washington on May 12, 1946 aboard the SS "Stetson Victory" and has applied for admission into the United States for the purpose of remaining here permanently;

- (5) That the appellant is not in possession of an immigration visa.

CONCLUSIONS OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

- (1) That under Section 13(c) of the Act of May 26, 1924, as amended, the appellant is inadmissible to the United States in that she is an alien ineligible to citizenship and not entitled to enter the United States under any exception of said sub-section;
- (2) That under Section 13(a) of the Act of May 26, 1924, the appellant is not inadmissible to the United States in that she is an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

The appellant met her husband on a bridge or in a park in Japan in November 1945. She cohabited with him in that country for a time while he was absent without official leave. Their testimony is conflicting regarding the manner in which they were supported during that time. The appellant testified that while her husband was absent without official leave they could only live by 'doing bad things.' She had no intention of proceeding to Sweden when she embarked. She cohabited with a former employer for about five years. She stated that she had been sick for about two years and that during that period she lived on her savings. She admits that she has had intimate relations with soldiers. She does not admit practicing prostitution. She also testified that at the insistence of her mother and sister she once submitted to a mental examination, that she was given a 'shot' and that there

was nothing wrong with her. Her testimony was rambling at times. She has been examined and passed by a medical officer of the United States Public Health Service. The record raises a doubt regarding whether the appellant and her husband intend to live together in the United States and the reasons that prompted them to enter into their marriage (p. 9). The appellant stated that she will jump overboard if she is sent back. She also stated that if she cannot be admitted permanently she would like to be admitted in transit. She states that she has 300 in England and 2000 krona in Sweden.

ORDER: It is ordered that the excluding decision of the Board of Special Inquiry be affirmed solely on the ground that the alien is ineligible to citizenship.

In accordance with 8 CFR 90.3, this case is referred to the Board of Immigration Appeals for consideration."

ARGUMENT

There is no dispute as to the facts, and the only question at issue is whether the appellee is entitled to enter the United States as a non-quota immigrant pursuant to Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, 8 U.S.C. Section 232, *supra*, and under Section 4(a) of the Immigration Act of 1924, 8 U.S.C. 204, *supra*.

The pertinent provisions of Public Law 271, *supra* are "that *notwithstanding any of the several*

clauses of Section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the Immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the Armed Forces of the United States during the Second World War shall, if otherwise admissible under the Immigration laws, and if application is made within three years of the effective date of this Act, be admitted to the United States: . . ." (Italics supplied)

It is indisputable that the legislation was designed to facilitate the admission of spouses and children of citizens serving in the Armed Forces. House Rep. 1320, 79th Congress, First Session. In executing this design, Congress might have provided in concise and unmistakable language an exemption from all immigration requirements. But the italicized passage of the statute indicates decisively that Congress intended to limit its bounty to the grant of two exemptions from normal immigration requirements:

- (1) Waiver of the provisions excluding physically and mentally defective aliens;
- (2) Elimination of documentary requirements.

The language of the statute and its legislative history demonstrates that Congress contemplated no relaxations beyond those specifically enumerated. 91 Cong. Rec. 11921, 12529. That is why the statute insists that applicants be “*otherwise admissible under the general immigration laws.*”

It is a fundamental rule of law that Congress must be presumed to have intended the plain meaning of the language used in a statute, and that the courts are to give effect to the legislative acts, and not to amend or repeal them. The doctrine enunciated in *Holy Trinity Church v. United States*, 143 U.S. 457, is not applicable where the intent of Congress is clear and unambiguous from the statute itself.

What plainer language could the Congress have employed than “*if otherwise admissible under the immigration laws.*”

Appellee, as will be shown hereafter, is racially ineligible to naturalization and therefore not “*otherwise admissible under the immigration laws.*”

It will be observed that Section 13(c) of the Immigration Act of 1924, 8 U.S.C. 213, *supra*, contains no exemption for the wives and children of American citizens who are invested with “non-quota status” by Section 4(a) of the same statute, 8 U.S.C.

204(a). That omission was questioned by the Supreme Court of the United States in *Chang Chan v. Nagle*, 268 U.S. 346 (1925), in which it was contended that Congress could not have contemplated the separation of families, and that the failure to provide an exception in favor of racially ineligible wives and children of citizens therefore was inadvertent. The Supreme Court rejected this argument and declined to supply an exception where Congress deliberately had omitted to provide it. The court said, p. 352:

“Taken in their ordinary sense, the words of the statute plainly exclude petitioners’ wives . . . Nor can we approve the suggestion that the provisions contained in Subdivision (a) of § 4 were omitted from the exceptions in § 13(c) because of some obvious oversight and should now be treated as incorporated therein. Although descriptive of certain ‘non-quota immigrants’, that subdivision is subject to the positive inhibitions against all aliens ineligible to citizenship who do not fall within definitely specified and narrowly restricted classes.”

Thus it must be conceded that if, as the Government claims, the appellee, is ineligible to naturalization, she is not admissible to the United States under Public Law 271, *supra*, and under Section 4(a) of the Immigration Act of 1924, *supra*.

At the time of appellee’s arrival in the United States, naturalization under Section 303 of the Na-

tionality Act of 1940, 8 U.S.C. 703, was limited to white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent.

Since *Ozawa v. United States*, 260 U.S. 178 (1922), it has been clear that persons of Japanese race are not eligible to become naturalized as American citizens.

Yamashita v. Hinkle, 260 U.S. 199, 43 S. Ct. 69, 67 L. Ed. 209;

United States v. Bhagat Singh Thind, 261 U.S. 204, 214, 43 S. Ct. 338, 67 L. Ed. 616;

Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255;

Porterfield v. Webb, 263 U.S. 225, 44 S. Ct. 21, 68 L. Ed. 278;

Webb v. O'Brien, 263 U.S. 313, 44 S. Ct. 112, 68 L. Ed. 318;

Cockrill vs. California, 268 U.S. 258, 45 S. Ct. 490, 69 L. Ed. 944.

With respect to persons of mixed racial blood, even prior to the promulgation of Part 350, Title 8 C.F.R., *supra*, the courts have uniformly deemed them eligible for naturalization only if they were preponderantly of an eligible racial strain. Thus it has been determined that a person whose father was white and

whose mother was Japanese is ineligible to naturalization.

In re Young, 198 Fed. 715 (Wash. 1912);

In re Camille, 6 Fed. 256;

In re Knight, 171 Fed. 299;

In re Alverto, 198 Fed 688;

In re Lampitoe, 232 Fed 382;

In re Rallos, 241 Fed 686;

In re Fisher, 21 Fed. (2d) 1007;

In re Cruz, 23 F. Supp. 774;

Morrison vs. People of the State of California, 291 U. S. 82.

Appellee, by her own admission, is not preponderantly of a racial eligible strain. When testifying before the Board of Special Inquiry at Seattle, Washington on May 13, 1946, she was asked the question, "Of what race are you?", to which she replied: "One-half German and one-half Japanese," (p. 30, record of hearing).

Thus appellee, as a person ineligible to naturalization, is inadmissible to the United States under Section 13(c) of the Immigration Act of 1924, 8 U.S.C. 213, *supra*, and was rightly excluded from admission to the United States by a duly constituted Board of Special Inquiry at Seattle, Washington on May 20, 1946.

CONCLUSION

The appellee is clearly inadmissible to the United States under Section 13(c) of the Immigration Act of 1924, *supra*, as a person ineligible to citizenship, and in entering the exclusion order the Immigration authorities did not act in an arbitrary manner, or misconstrue or misapply the law. Therefore, said order of exclusion is final and conclusive, and the District Court erred in granting the Writ.

It is respectfully submitted the judgment of the District Court should be reversed.

Respectfully submitted,

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No. 11454
In The
United States
Circuit Court of Appeals
For the Ninth Circuit

R. P. BONHAM, District Director, Immigration and Naturaliza-
tion Service, *Appellant*

VS .

HELENE EMILIE BOUISS, *Appellee*

Upon Appeal from the District Court of the United States
for the Western District of Washington, Northern Division

HON. PAUL J. McCORMICK, Judge

Brief of Appellee

LEO LEVENSON

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No. 11454

In The
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HON. PAUL J. McCORMICK, Judge

Brief of Appellee

JURISDICTION

This is a habeas corpus proceeding wherein the jurisdiction of the District Court and of the Appellate Court have been invoked under the provisions of Title 28 *USCA*, Section 452, and Title 28 *USCA*, Section 463.

Appellee heretofore submitted to this court a motion to dismiss the appeal. The motion was denied. Appellee again respectfully contends that this court has no jurisdiction to entertain the appeal for the following reasons:

(1) That appellant, R. P. Bonham, who filed the Notice of Appeal herein, *was not a party to the proceeding in the District Court and was not substituted as a party to the proceeding in the District Court at any time prior to the taking of said appeal* by him and by reason thereof this court is without jurisdiction to entertain this appeal;

(2) That George W. Tyler, Acting District Director, Immigration and Naturalization Service, who was the sole respondent in the District Court, did not take any appeal herein at any time within the time allowed by law or at all, and the time of the said George W. Tyler to take an appeal from the judgment in which R. P. Bonham purports to appeal from expired.

That the court has no jurisdiction of this appeal is based upon the authority of Title 28 *USCA Section 780*, and the authority of *Davis vs. Preston, 280 U. S. 406*; Rule 73 (a) (b) Federal Rules of Civil Procedure.

ABSTRACT OF THE CASE

Appellee is an alien woman, born in Kobe, Japan, and is one-half blood of the Japanese race and one-half blood

of the white race, her mother being Japanese and her father German. Appellee is lawfully married to John Anthony Bouiss, a citizen of the United States and an honorably discharged war veteran of the Second World War. This marriage occurred on the high seas while she and her husband were en route from Japan to the United States. Upon arrival in the United States appellee was removed to the Immigration Station in Seattle and accorded a hearing before a Board of Inquiry. The Commissioner of Immigration and Naturalization acting on behalf of the Attorney General entered an order excluding appellee from the United States on the ground that under Section 13 (c) of the Act of May 26, 1924, she was an alien ineligible to citizenship, and not entitled to enter the United States under any exception of the law. The order was approved by the Board of Immigration Appeals and appellee was ordered excluded.

A petition for a Writ of Habeas Corpus on behalf of appellee was filed. The sole respondent named in the petition was George W. Tyler, Acting District Director, Immigration and Naturalization Service, Seattle, Washington. It was alleged in said petition that the exclusion order was unlawful, null and void, in that as the wife of a

citizen of the United States, serving in the Armed Forces of the United States she was lawfully admissible to the United States as a non-quota immigrant under Section 4 (a) of the Immigration Act of 1924, and by virtue of Public Law 271, 79th Congress, Chapter 591, First Session, approved December 28, 1945, Title 8 USCA Section 232.

The Honorable Paul J. McCormick, Judge, granted the petition and appellee was ordered released.

George W. Tyler, *who was the sole respondent* in the District Court *did not appeal* from said order discharging appellee from custody. *No substitution from Tyler to R. P. Bonham as appellant was made in the District Court.* After the appeal was filed in the Circuit Court appellee submitted a motion to dismiss the appeal for the reasons heretofore given under the topic "jurisdiction." (page 1) The motion was denied and the application of appellant to be substituted was granted.

THE APPELLATE COURT HAS NO JURISDICTION LAW AND AUTHORITIES

Title 28 USCA, Section 780 is permissive only. It

authorizes substitution of a party under the conditions and as described by the statute. *Davis vs. Preston*, 280 U. S. 406.

One who is not a party to a record and judgment is not entitled to appeal therefrom.

Rule 73 (a) (b) Federal Rules of Civil Procedure;

Ex Parte Leaf Tobacco Board of Trade, 222 U.S. 578, 32 S.Ct. 833;

West vs. Radio-Keith-Orpheum Corp., 70 Fed. (2) 621;

Rose vs. Bank of America, 86 Fed. (2) 69 (CCA-9).

ARGUMENT

In the District Court George W. Tyler *was the sole party* respondent. He filed no notice of appeal from the order allowing the writ. Thereafter, *without any substitution of parties in the District Court*, appellant Bonham filed a notice of appeal. (Tr. p. 20)

The right to appeal and the time, conditions, and the party by whom the right is to be exercised, must not be confused with and is independent of the question of sur-

vivor of the proceedings and of the right of substitution. *Section 780, Title 28 USCA* is permissive only. It authorizes substitution of a party under the condition and as described by the statute. *It does not attempt to enlarge or affect the time in which an appeal must be taken, nor does it affect the question as to who is the proper party to take the appeal.* It is well established law that *one who is not a party to a record and judgment is not entitled to appeal therefrom.* *Ex Parte Leaf Tobacco Board of Trade, etc.,* 222 U.S. 578; *West vs. Radio-Keith-Orpheum Corp.,* (CCA-2) 70 Fed (2) 621.

The statute, *Section 780, Title 28 U.S.C.A.,* relative to survival of actions, etc., would not, nor does it purport to give the successor any additional time to take an appeal. That statutory time remained unchanged.

In *Davis vs. Preston*, 280 U.S. 406-50 S.C. 171, an action was prosecuted against Davis, "Federal Agent," under the railroad act. After the entry of judgment against Davis as Federal Agent, and before the time in which to take an appeal expired, Davis ceased to be "Federal Agent" and Andrew W. Mellon was appointed to succeed him. After Davis ceased to be Federal Agent an appeal from the judgment was taken in his name and was per-

fect. The court dismissed that appeal because Davis had no right to take an appeal after he ceased to be Federal Agent. Thereafter and after the statutory time for appeal expired Andrew W. Mellon applied to the Supreme Court for his substitution in place of Davis. The court held:

“But the motion must be denied. *The succession in office, as now appears, occurred before there was any effort to obtain a review of this Court. After the succession, Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute, and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.*

The provisions relating to substitution which were added to section 206 of the Transportation Act of 1920 by the Act of March 3, 1923, c. 233, 42 Stat. 1443 (49 USCA Sec. 74) are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they *disclose no purpose* either (a) to enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, or (b) to *modify or enlarge the prescribed statutory period* for invoking the reviewing power of this court.” (Emphasis supplied)

Neither would the statute nor the *Federal Rules of Civil Procedure* give the successor the automatic right to

take an appeal in a proceeding *to which his predecessor was the sole party*. The right of the successor to take an appeal could accrue *only after he had procured his substitution in the district court as a party to the proceeding*. This right could have been obtained upon application before the time to appeal elapsed. Then only would he stand in the position which would give him the right *to initiate and prosecute an appeal*.

There is no hardship in such a construction. Why should a successor of a party be given any greater privileges and an extension of time because his predecessor saw fit to remain inactive for a substantial period of the time allowed by the statute for the taking of an appeal?

It may be that the predecessor in office did not regard an appeal necessary or desirable and was satisfied with the decision of the lower court. If the successor in office deemed it important and necessary that an appeal should be procured it behooved him to take the proceedings necessary in the district court to place him in the position *as a party to the record* which would enable him to take an appeal. This he had to do as outlined in *Section 780* and it had to be done *in time* to accomplish his substitution *before the expiration of the time for taking of an appeal*.

It will be noted that *Section 780* authorizes substitution in a pending proceeding. *In the federal courts the commencement of an appeal is an independent proceeding.* There was no appeal pending when the successor assumed office. There was, however, a proceeding pending in the District Court. While judgment had been entered in the case in the District Court the law is well settled that an action is deemed pending until the time for appeal expires. The only action that was pending at the time of the filing of the notice of appeal by Bonham, the appellant, was the action in the District Court. *It was in that action that he had a right to apply for substitution and thereafter to give a notice of appeal.* But the right of substitution in a pending action is not the same as the right to initiate a new proceeding in another court.

Rule 73 (a) *Federal Rules of Civil Procedure*, provides:

“When an appeal is permitted by law from a district court to a circuit court of appeals *and within the time prescribed, a party* may appeal from a judgment by filing with the district court a notice of appeal * * *”
(Emphasis supplied)

Rule 73 (b)

“The notice of appeal *shall specify the parties* taking the appeal; * * *” (Emphasis supplied)

In the case at bar Tyler was the sole respondent. *Bonham*, the appellant, was not made a party to the record. He did not petition the District Court to be made a party until after the attempted appeal was docketed in the Circuit Court and after the time allowed to give notice of appeal in the District Court. Therefore, not being made a party within the time allowed by law, the notice of appeal was ineffectual to give the appellate court jurisdiction.

PROPOSITION OF LAW

A woman, even though ineligible to citizenship, if the wife of a United States Citizen of Second World War, is admissible as a non-quota immigrant by virtue of 8 U. S. C. A. Section 204 (4a), and Public Law 271, 79th Congress, Chap. 591.

LAW AND AUTHORITIES

Public Law 271, 79th Congress Chapter 591, 8 U. S. C. A. Section 232;

Ex parte Chiu Shee, 1 Fed. (2) 798;

Ex parte Cheung Sum Shee, 2 Fed. (2) 995;

Schouler, (6th Edition), Section 3.

Towne vs. Eisner, 245 U.S. 418.

First National Bank & Trust Co. vs. Beach, 301 U.S. 435.

ARGUMENT

The position taken by appellant to the effect that solely by reason of appellee's ineligibility to citizenship, she is not admissible to the United States, is untenable, if full effect is given to *Public Law 271, 79th Congress, Chapter 591*, approved December 28, 1945, 8 U.S.C.A., Sec. 232. This remedial statute which was passed during a period of war to expedite the admission to the United States of alien spouses of citizen members of the United States armed forces is in pari materia with Section 4 (a) of the Immigration Act of 1924, 8 U.S.C.A. Section 204.

When the Congress had for consideration Section 13 (c) of the Immigration Act of 1924, which denies admittance to those ineligible to citizenship, the report of the House Committee stated specifically, that wives of American citizens were exempted from those aliens who were to be excluded.

Ex parte Chiu Shee (District Court, D. Massachusetts, October 17, 1924), 1 Fed. (2d) 798.

"Return on a writ of habeas corpus to obtain the release of a person held for deportation by the immigration authorities, who decided that the Immigration Act of May 26, 1924 (43 Stat. 158), prohibited her from landing. The case is properly before the court, as

it involves the interpretation of a law on which the decision of the immigration officials is not final. *Gegiow vs. Uhl*, 239, U.S. 3, 36 S.Ct. 2, 60 L. Ed. 114.

These proceedings raise the question whether a Chinese woman, born of foreign parents, who is the wife of an American citizen, is prevented by the recent Immigration Act from entering this country, thus changing the settled law which allows such persons to join the husbands here * * *

“It will be noticed that subdivision (a) of section 4, which relates to the wives of American citizens, was not included among the exemptions. On this omission the assumption is based that Congress expressly forbade the entry of the wife of an American citizen, if she could not be naturalized. The assumption rests on an insecure foundation and arises from a literal construction of the act, without seeking to ascertain its intention. The result of such a construction would be that Congress showed itself more solicitous for the welfare of an alien minister or professor, whose wife is allowed to enter (section 13 (c) than for that of American citizens. Such a result would be absurd, and we are told by the highest authorities that an act of Congress should not be so construed as to lead to absurdities * * *’

‘Nor is such a construction necessary. Section 4 (a), standing alone, would allow a Chinese wife of an American citizen, not only to be admitted, but to be admitted in excess of the quota. *The omission of subdivision (a) of section 4 from the provisions of section 13 arose, not from a settled purpose of Congress to exclude such a wife, but from the fact that in considering section 13 Congress had only aliens in mind, and did not realize that the section as passed diminished the rights of American citizens, already carefully safeguarded by*

*section 4 (a). The reason why this inconsistency was overlooked was that the report of the House Committee stated specifically that wives of American citizens were exempted, and the chairman of that committee (Mr. Johnson), in the debate in the House, emphasized this feature of the bill. Congressional Record, vol. 65, No. 93 p. 5851. The discrepancy between section 4 (a) and section 13 (c) is thus reconciled by construing the latter provision as applying only to aliens who are not related to American citizens * * **" (Emphasis supplied)

To the same effect is *Ex parte Cheung Sum Shee et al*, *Ex parte Chan Shee et al*. (District Court, N.D. California, S.D. October 25, 1924.) 2 *Fed. (2d)* 995.

It is true that the position of the courts in the above cases was not accepted in *Chang Chan vs. Nagle*, 268 U.S. 346. That case involved American born Chinese claiming the right to bring into the United States their Chinese wives and children. That case was decided May 25, 1925. *It did not have a background of a global war involving the occupation of foreign lands by young American soldiers, and the normal inclination of fraternizing with peoples of such lands.* The words of a statute "are not phrases of art with a changeless connotation," and should vary with the circumstances and where the real intent of Congress can be obtained without absurdity and discrimination a broad

interpretation to its acts should be given in order to avoid inhumane results.

The Act of December 28, 1945, *59 Stat. 659*, Chap. 591, Public Law 271 provides, inter alia; Section 1:

“ * * * That notwithstanding any of the several clauses of Section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens * * * alien spouses * * * of United States citizens serving in, or having an honorable discharge certificate * * * shall if otherwise admissible under the immigration laws * * * be admitted to the United States * * *”

Section 2:

“Regardless of Section 9 of the Immigration Act of 1924, any alien admitted under section 1 of this Act shall be deemed to be a nonquota immigrant as defined in section 4(a) of the Immigration Act of 1924.”

Now it is apparent that *Section 1* of the above Act relates to the exclusion of those undesirable aliens *under the Act of February 5th, 1917*, but Section 2 provides, in all events, the alien spouse was admissible as a nonquota immigrant by virtue of *Section 4(a) of the Act of 1924* (8 U. S. C. A. 204). The phrase “*if otherwise admissible*” in Section 1 relates solely to those aliens *who were excluded under section 3 of the Act of 1917* and has nothing to do with Section 13(c) of *the Act of 1924*. If Congress intended to

exclude alien spouses who were “*ineligible to citizenship*” it is respectfully submitted that it would in plain language have so declared. However, Congress, specifically referred in Section 1 *to the Act of 1917*, which Act established the standard of admissibility of aliens, and that explains its use of the phrase “if otherwise admissible” instead of “eligible to citizenship.” *Section 1, relates to the Immigration Act of 1917 and SECTION 2 RELATES TO 4(a) OF THE IMMIGRATION ACT OF 1924.*

We do not believe that Congress in enacting *Public Law 271, supra*, had in mind a discriminatory intention. We do not believe that it was intended to extend to one class of citizen members of the United States armed forces serving in one part of the world the natural privilege of entering into marriage contracts, with their wives to emigrate to the United States and inviting other citizen members of the United States armed forces serving in another part of the world to live lives of concubinage, licentiousness and lewd cohabitation. The Armed Forces had no free choice of place of service. Many a young man was taken from his family and sent to every country on the globe, and it was not wholly unexpected that much courtship ensued. Thousands upon thousands of young men were taken from

their normal surroundings and transported to every section of the world. And the Hon. Paul J. McCormick, in the case at bar, recognized and gave expression to this normal social behavior, and interpreted Public Law 271 in its broadest scope, and said: (Tr. p. 16)

“This remedial statute was enacted in a post-bellum environment which found millions of the personnel of the armed forces of the Nation in distant and widely separated foreign areas around the globe. Its broad and comprehensive terms clearly state the purpose and object which Congress sought to accomplish by this legislative innovation. The intent to keep intact all conjugal and family relationships and responsibilities of honorably discharged service men of the Second World War is clearly expressed, and the obvious purpose to safeguard the social and domestic consequences of marriage of service men while absent from the United States must take precedence over a generalized phrase which if interpreted along purely racial lines would frustrate the plain purpose of the whole statute. Such a construction should not be adopted.”

See *Holy Trinity Church vs. United States*, 143 U.S. 457;

Ozawa vs. United States, 260 U.S. 178 at page 194;

Cabell vs. Markham, (C.C.A. 2, 1945), 148 F. 2d 737;

United States vs. 21 Pounds 8 Ounces of Platinum, (C.C.A. 4, 1945), 147 F. 2d, 78.

The court was giving a comprehensive interpretation to the remarks of *Schouler*, (6th Ed.) Section 3:

“Whether we consult the facts of history or the inspirations of human reason, the family may be justly pronounced the earliest of all social institutions. Man, in a state of nature and alone, was subject to no civil restrictions. He was independent of all laws, except those of God. But when united with woman, both were brought under certain restraints for their mutual well-being. The propagation of offspring afforded the only means whereby society could hope to grow into permanent and compact system. Hence the sexual cravings of nature were speedily brought under wholesome regulations; as otherwise the human race must have perished in the cradle. Natural law, or the teachings of a Divine Providence, supplied these regulations. Families preceded nations. * * *

The supremacy of the law of family should not be forgotten. We come under the dominion of this law at the very moment of birth; we thus continue for a certain period, whether we will or no. Long after infancy has ceased, the general obligations of parent and child may continue; for these last through life. Again, we subject ourselves by marriage to a law of family; this time to find our responsibilities still further enlarged. And although the voluntary act of two parties brings them within the law, they cannot voluntarily retreat when so minded. To an unusual extent, therefore, is the law of family above, and independent of, the individual. Society provides the home; public policy fashions the system; and it remains for each one of us to accustom himself to rules which are, and must be arbitrary.

So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business

firms. The ties of wife and child are for all classes and conditions; neither rank; wealth, nor social influence weighs heavily in the scales. To every one public law assigns a home or domicile; and this domicile determines not only the status, capacities, and rights of the person, but also his title to personal property. There is the political domicile, which limits the exercise of political rights. There is the forensic domicile, upon which is founded the jurisdiction of the courts. There is the civil domicile, which is acquired by residence and continuance in a certain place. The place of birth determines the domicile in the first instance; and one continues until another is properly chosen. *The domicile of the wife follows that of the husband*; the domicile of the infant may be changed by the parent. *Thus does the law of domicile conform to the law of nature.*"

The doctrine announced in *Holy Trinity Church vs. U. S.*, 143 U.S. 457, should be applied in this case. In interpreting congressional acts we also quote *Towne vs. Eisner*, 245 U.S. 418:

"A word is not a crystal, transparent and unchanged; it is the skin of a living thought *and may vary greatly in color and content according to the circumstances and the time in which it is used.*" (Emphasis supplied)

And also, *First National Bank & Trust Co. of Bridgeford vs. Beach*, 301 U.S. 435:

"We emphasize the fact afresh that the words of the statute to which meaning is to be given *are not phrases*

of art with a changeless connotation. They have a color and a content that may vary with the setting." (Emphasis supplied)

We submit that Congress did not intend to favor American soldiers in respect to their marital life who serve in one part of the world as against those serving in another part. *Congress did intend to preserve the marital status of the members of the armed forces all over the world.*

CONCLUSION

It is again respectfully submitted that appellant was not made a party to the record in the lower court and therefore has no standing to affect an appeal. It is also respectfully submitted that the conclusion reached by the lower court is in keeping with the intent of Congress and should be affirmed.

Respectfully submitted,

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No. 11454.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration and Naturalization Service,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

BRIEF OF JAPANESE AMERICAN CITIZENS
LEAGUE, AMICUS CURIAE.

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No. 11454.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration and Naturalization Service,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

BRIEF OF JAPANESE AMERICAN CITIZENS LEAGUE, AMICUS CURIAE.

Interest of the Japanese American Citizens League.

The Japanese American Citizens League is a national organization of American citizens of every racial descent. It has branches in California, Oregon and Washington. It is concerned with assuring all persons, no matter their ancestry, that they be free from discrimination and prejudice solely because of their race.

Hence, its appearance, with leave of Court, *amicus* urging judicial protection, indirectly, of an American citizen and World War veteran of non-Japanese descent; and, directly, of a Caucasian-Japanese of mixed racial ancestry, from being the victims of illegal administrative racial discrimination.¹

¹This brief is intended not to duplicate any of the arguments made by the appellee, in her brief, on appeal.

ARGUMENT.

The Appellee Is Admissible as the Wife of an United States Citizen Honorably Discharged From the Armed Forces of the United States, Under 8 United States Code, Section 232.

I.

Appellee Is Admissible, Although Ineligible to Citizenship.

The purpose of the statute is thus adequately stated by Judge Paul J. McCormick, the trial judge:

“This remedial statute was enacted in a post-bellum environment which found millions of the personnel of the armed forces of the Nation in distant and widely separated foreign areas around the globe. Its broad and comprehensive terms clearly state the purpose and object which Congress sought to accomplish by this legislative innovation. The intent to keep intact all conjugal and family relationships and responsibilities of honorably discharged service men of the Second World War is clearly expressed, and the obvious purpose to safeguard the social and domestic consequences of marriage of service men while absent from the United States must take precedence over a generalized phrase which if interpreted along purely racial lines would frustrate the plain purpose of the whole statute. Such a construction should not be adopted.” [R. 16.]

On its face, the statute is manifestly directed toward the wide and full protection of the American soldier, who, as the incidence of war (without request, or even con-

sent) found himself on America's farflung battlefronts.^{1a} Congress had declared war on Japan, as well as on Germany and Italy. On December 28, 1945, when it enacted the instant statute, Congress knew that American soldiers were in Japan as part of the American occupation forces; as they were in Germany, and Congress

^{1a}Some of the legislation designed for the benefit of the members of our armed forces in World War II are:

1. Servicemen's Readjustment Act (GI Bill of Rights) (38 U. S. C. 693 *et seq.*).
2. Soldiers and Sailors Civil Relief Act of 1940 (50 U. S. C. 501 *et seq.*).
3. National Service Life Insurance Act of 1940 (38 U. S. C. 801 *et seq.*).
4. Service Extension Act (50 U. S. C. A. App., Sec. 353).
5. Mustering Out Payment Act of 1944 (38 U. S. C. 691 *et seq.*).
6. Retraining and Re-employment Provisions:
 - a. Vocational Rehabilitation Act, 29 U. S. C., Secs. 31-41.
 - b. Selective Training and Service Act (50 U. S. C. A. App. 308).
 - c. Service Extension Act (50 U. S. C. A. App., Secs. 351, 352, 354, 356, 357, 360).
 - d. Army Reserve and Retired Personnel Service Law (50 U. S. C. A. App., Sec. 403).
7. Veterans' Preference Act of 1944 (5 U. S. C. A. 851-869).
8. Surplus Property Act of 1944 (50 U. S. C. A. App., Secs. 1611, 1612, 1625, 1632).
9. Income Tax Preferences (26 U. S. C., Secs. 22, 421, 3804, 3808).
10. Servicemen's Dependents Allowance Act of 1942 (37 U. S. C., Secs. 201-221).
11. Seeing-Eye Dogs (38 U. S. C. 251).
12. Preferences as to Public Lands (43 U. S. C., Secs. 279-283, 682a).
13. Housing (42 U. S. C. 1571-1573).
14. Disability Compensation and Pensions, *e.g.*, 38 U. S. C. 41.
15. Naturalization Rights in addition to the provision being considered in this case (8 U. S. C. 724, 10001, *et seq.*).
16. Additional eligibility for admission to U. S. Military and Naval Academy (34 U. S. C., Secs. 1091a, 1091e, 1094, 1036a, 1038, 1045).

knew too, that the American occupation of Japan might last many years—just as long, if not longer, than the occupation of Germany. Section 232, accordingly, contains no express racial discrimination against American war-brides coming from Japan.

Indeed, the House Report on the Bill, resulting in Section 232 (Report No. 1320, 79th Congress, First Session, House of Representatives) discloses no suggestion that Japanese-born wives of American soldiers, or other non-white wives, be treated any differently from Caucasian brides. The purpose of the Bill is thus stated in the Report:

“The purpose of the bill is to expedite the admission to the United States of thousands of alien brides who were married to our soldiers while the latter were serving abroad in the United States armed forces during the Second World War.”

Its objective is thus set forth:

“The sole objective of the bill is to expedite the admission to the United States of the alien spouses and alien minor children of citizen members who are serving or have served honorably in the armed forces of the United States during World War II.”

The Report further recites:

“It is estimated there are approximately 75,000 to 100,000 spouses of American service people throughout the world and that approximately 40,000 to 55,000 will come from Great Britain.”

It further states:

“One of the reasons for the introduction of this measure is due to the fact that it is believed such

strong equities run in favor of these service men and women in the right of having their families with them that cases certified for physical or mental reasons would eventually be admitted to the United States, either through the authority vested in the administrative officers to admit aliens temporarily, or through the medium of private bills introduced in the Congress."

If discrimination against American soldiers marrying certain alien spouses, of specified racial groups, is to be held judicially to be intended by the statute, the courts must read such discrimination into the statute, rather than apply its broad beneficial provisions, designed to protect all American soldiers wherever stationed.

(a) Section 232 Should be Construed Consistently With Recent Congressional Policy Against Race Discrimination.

In determining the intent of Congress in the enactment of Section 232, the general recent policy of Congress against race discrimination is to be noted—a policy which reflects itself in recent consistent amendments to the Naturalization Law, all designed to limit, if not entirely to eliminate racial distinctions.

Thus, when the Naturalization Act was incorporated in the Nationality Act in 1940, American Indians, who had been theretofore excluded were included, as were Filipinos having honorable service in the United States Army (8 U. S. C. 703). By a 1943 amendment to Section 703 (57 Stat. 601), persons of Chinese descent are now eligible to citizen-

ship; and more recently, July 2, 1946 (60 Stat. 534) the law was further amended so as to eliminate the discrimination against Hindus and Filipinos generally.

In addition, Congress has now eliminated race, as a complete and insurmountable bar to naturalization by the adoption of Section 724 and Section 1001 of the 8 U. S. Code. These sections² permit aliens of all races, upon service in the Armed Forces (Section 724, after three years; Section 1001, during the Second World War) to become American citizens, despite, and without any relationship to, their racial origin.

Therefore, to permit the exclusion of the appellee, is to construe Section 232, as running counter to the Congressional policy above set forth; and is entirely inconsistent with that policy.

(b) Section 232 Should be Construed Consistently With Our Constitutional Policy Against Racial Discrimination.³

(1) OUR CONSTITUTIONAL POLICY.

It is the mandate of our Constitution that racial discrimination is warranted only "under circumstances of direct emergency and peril" (*Korematsu*

²*Cf. Re Fong Chew Chung*, 149 F. (2d) 904 (this Court), upholding and enforcing Sec. 1001.

³*Cf. James v. Marinship Corp.*, 25 Cal. (2d) 721, 739, holding that discrimination by a labor union against negro unions to be: "Contrary to the public policy of the United States" as well as the policy of the State of California; and that such discrimination was in violation of "a definite national policy against discrimination because of race or color." (p. 740.)

v. United States, 323 U. S. 214, 220.)⁴ Both overt and subtle discrimination are equally unconstitutional.⁵

For it has been decided that "loyalty is a matter of the heart and mind, not of race, creed or color." (*Ex parte Endo*, 323 U. S. 283, 302.)⁶

In the instant case, as in that of *Ex parte Kawato*, 317 U. S. 69, 71, there is nothing in this record (that) indicates, and we cannot assume that he (she) came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his (her) home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.

Although dissenting in result, Justice Murphy best expressed the views of the Supreme Court upon the

⁴Cf. Excellent statement of the principle by Judge Paul J. McCormick, in *Mendez v. Westminster School District*, 64 Fed. Supp. 544, 548: "Distinctions of that kind have recently been declared by the highest judicial authority of the United States' by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They are said to be 'utterly inconsistent with American traditions and ideals.' *Gordon Kiyoshi Hirabayashi v. United States*, 320 U. S. 81, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774." (The case is on appeal, No. 11310, but the appeal involves a procedural point only.)

⁵See *Lane v. Wilson*, 307 U. S. 268; *Hill v. Texas*, 316 U. S. 401; *Norris v. Alabama*, 294 U. S. 591.

⁶The loyalty of persons of Japanese descent was directly recognized by the Supreme Court, in *Ex parte Endo* (323 U. S. at p. 304) in its quotation, with approval, from President Roosevelt: "Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities."

unconstitutionality of racial discrimination when he concluded his opinion in the *Korematsu* case, thus (p. 242):

“Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kind in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States.”⁷

(2) TO EFFECTUATE OUR CONSTITUTIONAL POLICY ESCHEWING RACIAL DISCRIMINATION, THE COURTS WILL ENJOIN SUCH DISCRIMINATION IN A STATUTE, NOT EXPRESSLY PROVIDING FOR SUCH DISCRIMINATION.

Thus, by way of example, in *Steele v. L. & N. R. Co.*, 323 U. S. 192, 203, a labor organization, acting under authority of a federal statute, was enjoined from practicing racial discrimination, although the federal statute did not provide for such discrimination; and, on the contrary, was entirely silent on the subject.

The Supreme Court upset the practice of racial discrimination because “here the discriminations

⁷Deprivation of liberty because of a particular racial origin, according to Justice Murphy concurring in *Hirabayashi v. United States*, 320 U. S. 81, 111: “. . . bears a melancholy resemblance to the treatment accorded to the members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purpose of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry.”

based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. *Yick Wo v. Hopkins*, 118 U. S. 356; *Yu Cong Eng v. Trinidad*, 271 U. S. 500; *Missouri ex rel Gaines v. Canada*, 305 U. S. 337; *Hill v. Texas*, 316 U. S. 400.”

Justice Murphy concurred, protesting the “cloak of racism” to which the labor union resorted to, and concluding: “Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.” (*Steele v. L. & N. R. Co.*, 323 U. S. 192, 209.)

Mitchell v. United States, 313 U. S. 80, 95, is to the same effect. Although no federal statute barred racial discrimination in interstate commerce, the Supreme Court held provisions of a state statute, permitting such discrimination, to be invalid, as improper burdens upon interstate commerce.

(3) SINCE SECTION 232 CONTAINS NO EXPRESS RACIAL DISCRIMINATION IT SHOULD BE CONSTRUED AS PERMITTING NO DISCRIMINATION BECAUSE OF RACE.

In the instant case, the construction of the statute by the immigration authorities results in a distinction between American citizens with respect to their right to have a spouse join them in the United States.⁸

⁸On its face, the statute, manifestly, provides for no such racial discrimination.

The citizen is thus deprived of the full enjoyment of the right of consortium ^{8a} solely on racial grounds; as in some other situations, the citizen's right is affected by a prohibition or restriction which in terms is directed at an alien relative. *Cf. Estate of Yano*, 188 Cal. 545, 206 Pac. 995.⁹

Congress is not to be deemed to have intended to impose a racial distinction unless it unequivocally expresses this intention; for a statute is not to be construed so as to detract from any of the Constitutional principles unless no other construction is possible. (See *Ex parte Endo*, 323 U. S. 283.)

Here Congress has not, as in the statute involved in *Chang Chan v. Magle*, 268 U. S. 346,¹⁰ referred to specific provisions of other laws; it has instead used a general expression which is capable of either a broad or narrow construction. The narrow construction must be accorded to it, because the broader one infringes upon the constitutional right to be free from racial discrimination.

^{8a}That the right to consortium is a fundamental and valuable rights, see 26 Am. Jur. 645, Husband and Wife, Sec. 15, and cases cited.

⁹*Cf. Truax v. Raich*, 239 U. S. 33; *Buchanan v. Warley*, 245 U. S. 60; and *Nixon v. Herndon*, 273 U. S. 536. In all these cases, one individual's constitutional rights were held to be violated by virtue of the effect upon him of a prohibition imposed on another associated individual.

¹⁰The *Chang Chan* case, moreover, did not concern itself with a special war-time statute designed broadly to protect the American soldier and veteran—a purpose which would be frustrated if discrimination against certain American soldiers, because of the race of their wives, is permitted.

Moreover, the adoption of appellant's argument would lead to the following judicial result: The alien Japanese wife of an alien

II.

**Appellee Is Admissible Because Eligible to Citizenship
Under Sec. 724, 8 U. S. Code.**

Under provisions of Sec. 724, 8 U. S. C., the appellee is now no longer completely ineligible to citizenship merely because of her race. Upon entry into the United States, she may, along with all other aliens of Japanese descent, if she is accepted for service in the Armed Forces, become a citizen, after three (3) years honorable service.

As indicated, there is nothing in the instant record, as there was not in the record in *Ex parte Kawato*, 317 U. S. 69, 71, that she came to America "for any purpose different than what prompted millions of others to seek our shores—a chance to make his (her) home and work in a free country, governed by just laws, which promise equal protection to all who abide by them."

She, like the others mentioned in *Schneiderman v. United States*, 320 U. S. 118, 120, seeks "refuge in the new world from cruelty and oppression of the old."¹¹

(2) *Osawa v. United States*, 260 U. S. 178, and companion cases are erroneously decided and should be overruled.

Japanese professor or minister may be admitted to the United States to accompany or follow the latter (Sec. 13c (8 U. S. C., Sec. 213)), and (Sec. 4 (8 U. S. C., Sec. 204)); while an alien Caucasian-Japanese wife of an honorably discharged American soldier may not, similarly enter the United States.

¹¹While Japan is now in the process of being democratized by our armed forces, it manifestly will be many years before Japan will recover from the ravages of war and the suffering and, at times, starvation, which is the present lot of the people of Japan—a lot which the courts ought not to visit upon an ex-GI's war bride, unless inexorably required by express Congressional mandate.

(We realize that this Court may not overrule the *Ozawa* and companion cases. That task is for the Supreme Court alone. We urge the point, however, so that it is timely raised, in the event this cause should reach the Supreme Court of the United States.)

(3) 8 U. S. Code, Section 703(4) is unconstitutional because unreasonable.

(We deem the foregoing point to be unnecessary to a ruling by this, or the Supreme Court of the United States, affirming the judgment below. Should either this Court, or the Supreme Court, reach the above point, it is our position that Section 703(4) is unconstitutional because unreasonable.)

Conclusion.

Already this nation has committed itself generally, as a signatory to the United States Charter to the protection of "human rights and fundamental freedom for all, without distinction as to race, sex, language or religion." More particularly, thus far, by armed force, we have induced the present Japanese government to adopt a "Japanese Bill of Rights," and directing it to "remove restrictions on political, civil and religious liberties and discriminations on the grounds of race, nationality, creed or political opinion . . ."¹²

¹²"Occupation of Japan," Department of State Publication, United States Government Printing Office, Washington, D. C., p. 19.

And we have assured that the present Japanese Constitution provides,

“All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.”¹³

It is respectfully suggested that our judicial policy be consistent with our national policy—and that both, equally, should not tolerate discrimination because of race.

Respectfully submitted,

WIRIN, KIDO AND OKRAND,

By A. L. WIRIN,

*Attorney for Japanese American Citizens League,
Amicus Curiae.*

NANETTE DEMBITZ,
New York City,
Of Counsel.

¹³Article XIII, Japanese Constitution, *ibid.*, at p. 120.

No. 11457

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, deceased,
Appellant,
vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

JAN 23 1947

PAUL P. O'BRIEN,
CLERK

No. 11457

United States
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[*1]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Montana

No. 178

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, deceased,
Plaintiff,

vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a Corporation,
Defendant.

Be It Remembered that on February 14, 1946,
Plaintiff's Complaint was filed herein, being in
the words and figures following, to-wit: [2]

COMPLAINT

The plaintiff complains and alleges:

1.

That at all times hereinafter mentioned, the defendant was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of Nebraska, and carrying on a general life, health and accident insurance business in the State of Montana, but at all such times, the defendant was, and now is, a citizen of the state of Nebraska.

2.

That at all times hereinafter mentioned, the plaintiff was, and now is, a citizen of the State of Montana, and residing therein at the City of Butte.

3.

That the amount involved in this action at law, exclusive of interest and costs, is the sum of Twenty-four Thousand, Three Hundred, Seventy-four and 91-100 (\$24,374.91) Dollars. [3]

4.

That on or about November 25, 1944, Jakor Aleksich, then a resident of Silver Bow County, in Montana, died intestate, leaving estate in said county; that on January 14, 1946, the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, by an order duly given and made, appointed this plaintiff administratrix of the estate of Jakor Aleksich, deceased; plaintiff forthwith qualified as such, by filing the bond, and taking the oath required by law and by the said order. She is now the administratrix of the estate of Jakor Aleksich, deceased.

5.

That on October 6, 1943, in Silver Bow County, in Montana, the defendant, in consideration of Twenty-one and 50/100 (\$21.50) Dollars, paid to it by Jakor Aleksich, issued and delivered to Jakor Aleksich a written contract of insurance for one-fourth of a year thereafter, and agreed therein that the payment by said Jakor Aleksich to said defendant, and acceptance by defendant of Sixteen and 50/100 (\$16.50) Dollars, quarterly in advance, beginning January 1st, 1944, would keep said policy of insurance in continuous effect; that Jakor Aleksich made to the defendant every of such payments

of Sixteen and 50/100 (\$16.50) Dollars, quarterly in advance until he died, and defendant accepted all of the same. The said policy remained in full force and effect until Jakor Aleksich died.

6.

That the defendant in said policy insured Jakor Aleksich against all loss of time, commencing while said policy was in force, resulting directly and independently [4] of all other causes from bodily injuries during any term of this policy through purely accidental means, there were no limitations in the said policy contained on indemnity for total loss of time. The same was an open policy as to indemnity for total loss of time commencing while the policy was in force; and the said policy recited that: "This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance." That there was endorsed on the said policy when delivered to Jakor Aleksich these words:

"Beware—Your policy with us is the best insurance you can buy."

There was also endorsed on said policy when delivered; the following words, punctuated as follows:

"This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided."

7.

That on or about November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in

the Anselmo Mine in Silver Bow County, Montana, in the United States of America, while the said policy was in force; that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to therein earn any money; that Jakor Aleksich survived the said injuries an appreciable length of time, to-wit: More than one hour, and during such hour he owned a cause of action against the defendant for total loss of his time that [5] he would have had, and could have put to valuable work but for such injuries; that during such time of his survival of said injuries, he did not commence any action or suit to enforce collection of said cause of action; that under the law of Montana, wherein said contract was executed, such cause of action survived to this administratrix, and is now being prosecuted. Also plaintiff alleges that no payment of any kind was ever made at all by the said defendant to Jakor Aleksich, or to this plaintiff as administratrix, for such loss of time, or for any part thereof.

8.

That Jakor Aleksich, on the 25th day of November, 1944, was of the age of fifty-six years, four months and twenty-eight days; that he was, before the total permanent injuries occurring to him, as aforesaid, of robust health, strong, active and intelligent as a miner, which was his occupation; that he had an earning capacity of Seven and 75/100 (\$7.75) Dollars per day; that his services were in

demand for five days per week, and would have remained in demand during his expectancy for the same number of days, and at the same rate; that he had an expectancy of life under the American table of 16.5 years; that because of his robust health, he had an actual expectancy of a longer life than 16.5 years; that his annual earnings were Two Thousand, Fifteen (\$2,015.00) Dollars; that his expected life earnings were Thirty-three Thousand, Two Hundred, Forty-seven and $51/100$ (\$33,247.51) Dollars; that the legal rate of interest in Montana, at all times herein mentioned, was, and is, Six (6%) percent, per annum; that a a Five (5%) percent. annual discount for 16.5 years, or 858 weeks, the present [6] value of his time, at the time he was so injured, was Twenty-four Thousand, Three Hundred, Seventy-four and $91/100$ (\$24,374.91) Dollars, in which amount the defendant agreed to pay for Jakor Aleksich's loss of time by the said policy. That an exact copy of the said policy is hereunto annexed and made a part hereof, marked "Exhibit A."

9.

That immediately after the death of Jakor Aleksich, as provided in the said policy, this plaintiff, who was the beneficiary named therein, gave notice to the defendant of the injuries and death of Jakor Aleksich; that the defendant, within fifteen days after the death of Jakor Aleksich, in writing, denied that there was any liability at all of the defendant under the said policy.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twenty-four Thousand, Three Hundred, Seventy-four and 91/100 (\$24,374.91) Dollars, and for her costs of suit.

H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

Complaint drawn by:

LAUNDES MAURY,
33 Hirbour Building,
Butte, Montana. [7]

EXHIBIT "A"

PERFECT INCOME POLICY

This Policy Provides Benefits for Loss of Limb, Sight or Time, by Accidental Means, or Loss of Time by Sicknes as Herein Provided.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, OMAHA
(Herein called the Association)

Hereby insures Jakor Aleksich (herein called the Insured), of City of Butte, State of Montana, against loss of limb, sight or time, sustained or commencing while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this policy, through purely accidental means, and against loss of time beginning while this policy is in force and caused by disease contracted during

any term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

The date of this policy is October 6, 1943.

The copy of the application attached hereto is hereby made a part of this contract, and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of Twenty-one and 50/100 (\$21.50) Dollars as first payment. The payment in advance, and acceptance by the Association, of premiums of Sixteen & 50/100 (\$16.50) Dollars quarterly thereafter, beginning with Jan. 1, 1944, is required to keep this policy in continuous effect.

Accident Indemnities

Specific Losses

Part A.

If the Insured shall sustain bodily injuries, as described in the Insuring Clause, which injuries shall, independently and exclusively of disease, and all other causes, continuously and wholly disable [8] the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For loss of both hands.....	\$1,000.00
For loss of both feet.....	1,000.00
For loss of one hand and one foot.....	1,000.00
For loss of entire sight of both eyes.....	1,000.00
For loss of one leg.....	700.00
For loss of one arm.....	700.00

For loss of one hand.....	500.00
For loss of one foot.....	500.00
For loss of entire sight of one eye.....	200.00
For loss of thumb and index finger of either hand	300.00
For loss of one or more fingers.....	100.00
For loss of one or more entire toes.....	100.00

Loss in every case referred to in the above schedule for dismemberment of hand or hands, or foot or feet, shall mean severance at or above the wrist or above the ankle joint, respectively. The loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Loss of arm or leg shall mean severance at or above the elbow or the knee joint, respectively. Loss of thumb, finger or toe shall mean severance of at least one entire phalanx. Only one of the amounts named will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

Part B.

Total Accident Disability Benefits Eighty Dollars Per Month

If such injuries, as described in the Insuring Clause, do not result in any of the above mentioned specific losses, but shall wholly and continuously disable the Insured for one day or more, the Association will pay a monthly indemnity at the rate of Forty (\$40.00) Dollars for the first month, and at the rate of Eighty (\$80.00) Dollars per month thereafter, but not to exceed twenty-four months.

Part C.

Partial Accident Disability Benefits
Thirty Dollars Per Month

If such injuries, as described in the Insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, the Association will pay for the period of such partial loss of time, but not exceeding three consecutive months, a monthly indemnity of Thirty (\$30.00) Dollars. [9]

Part D.

Medical Attendance Twenty Dollars

If such injuries, as described in the Insuring Clause, require immediate medical or surgical treatment by a physician, surgeon or osteopath, and the Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, but not exceeding Twenty (\$20.00) Dollars.

Part E.

Financial Aid Two Hundred Dollars

If such injuries render the Insured physically unable to communicate with friends, the Association will, upon receipt of a message giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses necessary to put the Insured in communication with, and in the care of friends, providing such expense shall not exceed

the sum of Two Hundred (\$200.00) Dollars. This benefit to be in addition to any other benefits.

Part F.

Confining Illness Disability Benefits

Eighty Dollars Per Month

If disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, confines the Insured continuously within doors and requires regular visits therein by a legally qualified physician, the Association will pay at the rate of Forty (\$40.00) Dollars for the first month, and at the rate of Eighty (\$80.00) Dollars per month thereafter, but not to exceed twelve months; provided said disease causes total disability and necessitates total loss of time.

Part G.

Non-Confining Illness Disability

Forty Dollars Per Month

If disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, does not confine the Insured continuously within doors, but requires regular medical attention, the Association will pay at the rate of Forty (\$40.00) Dollars per month, but not to exceed one month; provided said disease necessitates continuous total disability and total loss of time. [10]

Part H.

Additional Benefits If Confined to Hospital

If the Insured, on account of any disability cov-

ered by this policy, shall be continuously confined within a hospital for one day or more, the Association will pay for such hospital confinement an additional indemnity at the rate of Forty (\$40.00) Dollars per month, but not to exceed three consecutive months.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured, or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall avoid the policy, or be used in any legal proceeding hereunder. No agent has authority to change this policy, or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Association, and such approval be endorsed hereon.

3. If the default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Association, or by any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained, and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on

which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury, or within ten days after the commencement of disability from such sickness. In event of accidental death, immediate notice thereof must be given to the Association.

5. By such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall [11] not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible.

6. The Association, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days

after the termination of the period for which the Association is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability, will be paid within sixty days after receipt of due proof.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured. [12]

12. If the Insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the

Association, upon written request of the Insured, and surrender of the policy, will cancel the same, and will return to the Insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law, or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Additional Provisions

(a) This policy does not cover death, disability, or other loss sustained in any part of the world except the United States and Canada, or while the Insured is engaged in military or naval service in time of war, or any act of war, or while the Insured is not continuously under the professional care and regular attendance, at least once a week,

beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of, or while participating in aeronautics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the Insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the Insured, is a condition precedent to recovery, and [13] any failure in this respect shall forfeit to the Association all right to any indemnity.

(c) The term of this policy begins at 12 o'clock noon, Standard Time at the place where the Insured resides, on the date hereof against accident, and on the thirty-first day thereafter against disease, and ends at 12 o'clock noon on date any renewal is due.

(d) The mailing of notice to the Insured at least fifteen days prior to the date they are due shall constitute legal notice of dues, and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for additional premium. The acceptance of any renewal premium shall be optional with the Association. No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(e) The annual meeting of the Association will be held at ten o'clock a.m. on the second Saturday

after the first day of February, at the Home Office of the Association.

In Witness Whereof, Mutual Benefit Health & Accident Association has caused this policy to be signed by its President and its Secretary, but the same shall not be binding upon the Association unless countersigned by its duly authorized Policy Clerk, nor unless delivered to the Insured while in good health and free from injury.

C. C. CRISS,
President.

C. E. FORBES,
Secretary.

Countersigned by:

M. C. KINSLEY,
Policy Clerk.

CHAS. A. CHALKLEY,
Resident Vice-President. [14]

APPLICATION FOR INSURANCE

Use black ink—This is to be photographed.

1. What is your full name?

Mr. Jakor Aleksich.

(Print full first, middle and surname.)

2. What is your residence address? 104 East Park. County? Silver Bow. City or town? Butte. State? Mont. Address to which premium notices are to be sent? Same as above.

3. What is your age? 55. Race? White. National-

ity? Serbian. Date of birth? June 28, 1888. Place of birth? Serbia. Height? 6-1. Weight? 185 pounds. Sex? Male.

4. Whom do you name as beneficiary? Alva Aleksich. Address? Murray Hospital, Butte, Mont. (Print full first, middle and surname.) Relationship? Niece.

5. What is your occupation? Miner, underground.

6. What are all of your duties connected therewith? General underground mining.

7. Name of firm? Anaconda Copper Mining Co. Nature of business? Mining and smelting. Location of firm? Butte, Montana. (Street, City and State)

8. Do your average monthly earnings exceed the monthly indemnity payable under the policy now applied for and under all other disability insurance now carried by you? Yes. What are your average monthly earnings? \$200.00.

9. What disability or accidental death insurance do you carry? What companies and amounts? \$2,200.00. Group life. Serbian Lodge #3, \$1,000.00, life, Butte, Mont. Have you any applications for life or disability insurance pending? Answer as to each? None.

10. Has any application ever made by you for life or disability insurance been declined, postponed or rated up, or has any life or disability insurance issued to you been cancelled? Answer as to each? None. Has any renewal or reinstatement of life or

disability insurance been refused? Answer as to each? None. If so give full particulars.

11. Have you ever made claim for, or received indemnity on account of any injury or illness? If so, what companies, dates, amounts and causes? None.

12. What is the form of policy applied for? 30-D. What is the premium? \$21.50 1st qr. \$16.50 sub. How much premium have you paid? \$21.50.

13. Are you sound physically and mentally? Answer as to each? Yes. Are you maimed or deformed? Answer as to each. None. Have you any impairment of sight or hearing? Answer as to each? None. Are your habits correct and temperate? Yes.

14. Have you ever had any of the following diseases? Rheumatism, neuritis, arthritis, sciatica, epilepsy, appendicitis, diabetes, any kidney or bladder trouble, any disease of the brain or nervous [15] system, heart disease, tuberculosis, bronchitis, gall bladder trouble, any stomach trouble, any intestinal trouble, hernia, cancer, syphilis, high or low blood pressure, tonsillitis, rectal trouble, malaria?

Name diseases, dates and length of disability? None.

Has any member of your family ever had tuberculosis? None.

15. Have you received medical or surgical treatment, or had any local or constitutional disease not mentioned above, within the last five years? Answer as to each? None, except minor colds. In?.....

For?..... Lasting?..... Year and month.
Nature.

16. Have you ever been operated on by a physician or sugeon? Removal of tonsils. Date? 1928. For? Tonsils removed. Fully recovered. St. James Hospital, Butte.

17. Do you understand and agree that no insurance will be effected until the policy is accepted by you while in good health and free from injury? Yes.

18. Do you hereby apply to the Mutual Benefit Health & Accident Association for a policy to be issued solely and entirely upon the written answers to the foregoing questions, and do you agree that the Association is not bound by any statement made by or to any agent unless written herein, and do you agree to notify the Association promptly of any change in your occupation, or if you take additional insurance, and do you hereby authorize any physician or other person who has attended, or may attend you, to disclose any information thus acquired? Yes.

19. Do you authorize the Association to make such alteration in the application as may correct any spelling therein, or to correct any other apparent error or omission, and do you agree that your acceptance of such policy shall ratify such alterations? Yes.

Your check made payable to the Company is your receipt. (This is important.)

Dated at Butte, Mont., this 28 day of Sept., 1943.

Signature of Applicant:

JAKOR ALEKSICH.

What amount of premium have you paid? \$21.50.

Complaint filed Feb. 14, 1946.

/s/ H. H. WALKER,
Clerk. [16]

Thereafter, on March 6, 1946, Defendant's Answer was filed herein, being in the words and figures following, to-wit: [17]

[Title of District Court and Cause.]

ANSWER

Comes now Mutual Benefit Health and Accident Association, defendant in the above entitled action, and, for its answer to plaintiff's complaint filed herein, admits, denies, and alleges, as follows:

1. Admits the allegations contained in paragraph 1 of plaintiff's complaint, except that defendant denies that it is, or has been, carrying on a general life insurance business in the State of Montana.

2. Admits the allegations contained in paragraph 2 of plaintiff's complaint.

3. Admits that the amount involved in this ac-

tion, exclusive of interests and costs, as alleged in plaintiff's complaint is the sum of \$24,374.91, but denies that said amount, or any other sum or amount, is involved in this action.

4. Admits the allegations contained in paragraph 4 of plaintiff's complaint.

5. Admits the allegations contained in paragraph 5 of plaintiff's complaint. [18]

6. Answering the allegations contained in paragraph 6 admits that defendant insured Jakor Aleksich against loss of time sustained or commencing while said policy was in force, resulting directly and independently of all other causes from bodily injuries during any term of said policy through purely accidental means, subject to all the provisions and limitations in said policy contained; denies that there are no limitations in said policy on indemnity for total loss of time; denies that said policy is an open policy as to indemnity for loss of time commencing while the policy was in force. Admits that said policy recited that: "This policy includes endorsements and attached papers, if any, and contains the entire contract of insurance." Admits that there was pasted on said policy when delivered to Jakor Aleksich these words: "Beware—Your policy with us is the best insurance you can buy." Admits that there was endorsed on said policy when delivered the following words, punctuated as follows: "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided."

7. Answering the allegations of paragraph 7, admits that on or about November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in the Anselmo Mine, in Silver Bow County, Montana, in United States of America, while said policy was in force; admits that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to earn any money; admits that said Jakor Aleksich survived said injuries for an appreciable length of time, to-wit: about one hour, but denies that during such hour he owned a cause of action against the defendant for total loss of his time that he would have had, and could have [19] put to valuable work, but for such injuries; admits that during such time of his survival of said injuries, he did not commence any action or suit to enforce collection of said alleged cause of action; denies that any such alleged cause of action survive to his administratrix. Admits that no payment of any kind was made at all by defendant to Jakor Aleksich, or to plaintiff as Administratrix, for loss of time.

8. Answering the allegations of paragraph 8, admit that Jakor Aleksich on the 25th day of November, 1944, was of the age of fifty-six years, four months and twenty-eight days, and that he was before the total permanent injuries occurring to him, resulting in his death, of robust health and a strong and active and intelligent miner, which was his occupation; admits that he had an earning

capacity of \$7.75 per day; admits that his services were in demand for five days per week, and denies any knowledge or information sufficient to form a belief as to whether his services would have remained in demand for the same number of days at the same rate during his life expectancy; denies any knowledge or information sufficient to form a belief as to whether his life expectancy was 16.5 years, and denies any knowledge or information sufficient to form a belief that he had an actual expectancy of a longer life than 16.5 years; denies any knowledge or information sufficient to form a belief as to the amount of his annual earnings; denies any knowledge or information sufficient to form a belief that his expected life earnings were \$33,247.51; admits that the legal rate of interest in Montana at all times mentioned in plaintiff's complaint was and is six per cent per annum; denies any knowledge or information sufficient to form a belief that the present value of his time, at the time he was injured, was \$24,374.91, or any other sum or amount; and denies that defendant agreed to [20] pay for Jakor Aleksich's loss of time in such amount or in any amount except as provided by the terms of said policy. Denies that an exact copy of said policy is attached to plaintiff's complaint, marked "Exhibit A", and alleges that defendant attaches as a part of this answer a true copy of said policy in the form executed and delivered to said Jakor Aleksich, except that it has stamped on its face "Sample Copy."

9. Answering the allegations of paragraph 9,

defendant admits that immediately after the death of Jakor Aleksich, as provided in said policy, plaintiff gave notice to the defendant of his injuries and death, and that defendant within fifteen days after the death of Jakor Aleksich denied, in writing, any liability of defendant under said policy.

10. Denies that plaintiff is entitled to a judgment in the sum of \$24,374.91, or in any other sum or amount, under the contract of insurance set forth in plaintiff's complaint.

Wherefore, defendant having fully answered plaintiff's complaint, prays that plaintiff take nothing by reason of her alleged cause of action, and that defendant have judgment for its costs.

/s/ J. A. POORE,

/s/ JAMES A. POORE, JR.,

Attorneys for Defendant.

Service of the foregoing Answer is admitted and copy thereof received this 6th day of March, 1946.

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Plaintiff.

Answer filed March 6, 1946.

/s/ H. H. WALKER,

Clerk. [21]

[Printer's Note]: Mutual Benefit Perfect Income Policy set out on pages 7 to 17.

Thereafter, on May 23, 1946, Plaintiff's Motion to Amend the Complaint and the Exhibit attached thereto, was filed herein, being in the words and figures following, to-wit: [24]

[Title of District Court and Cause.]

MOTION TO AMEND

Comes now the plaintiff and moves the court for leave to amend the complaint by striking from the second line on page three thereof, and the third and fourth lines on page three thereof, the following words:

“Subject, however, to all of the provisions and limitations thereafter contained in the policy”.

And also leave to amend by striking from the said complaint the word “thereafter” on page 3, line five.

Also move to amend by striking from “Exhibit A” to the Complaint, a comma after the word “sickness” in the caption in the third line of the Exhibit.

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiff.

NOTICE

This motion will be presented to the Court im-

mediately before the opening of the trial of the said cause on [25] May 23rd, 1946.

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiff.

Service of the foregoing Motion and Notice is hereby acknowledged, and copy thereof received this 14th day of May, 1946.

JAMES A. POORE, JR.,

Attorney for defendant.

Filed May 23, 1946.

/s/ H. H. WALKER,

Clerk. [26]

Thereafter, on May 23, 1946, an Order allowing amendment to the Complaint and Exhibit attached, was duly made and entered herein, being in the words and figures following, to-wit: [27]

[Title of District Court and Cause.]

ORDER ALLOWING AMENDMENT TO
COMPLAINT

This cause came on regularly for trial this day, Mr. H. L. Maury being present and appearing for the plaintiff, and Mr. James A. Poore, Jr., being present and appearing for defendant.

Thereupon Mr. Poore asked that the name of Mr. William Meyer be entered as associate counsel for the defendant and it was so ordered.

Thereupon Mr. Maury filed and presented to the Court a motion to amend the complaint herein, and moved the Court for leave to amend the complaint in accordance with said motion, to-wit: by striking out the words "Subject, however, to all of the provisions and limitations thereafter contained in the policy", appearing on page 3, lines 2, 3 and 4; by striking the word "thereafter", appearing on page 3, line 5, and by striking from Exhibit A to the complaint, a comma appearing after the word "sickness", in the caption in the third line of said Exhibit.

Thereupon counsel for defendant stated that they have no objection to the granting of the motion to strike the comma from the Exhibit, whereupon Court ordered that the amendment be made by the Clerk.

Thereupon counsel for the defendant objected to the other amendments requested, whereupon, after the arguments of counsel, Court ordered that the objections be overruled, that the motion for leave to amend be granted, and that the amendments be made by interlineation by the Clerk.

Thereupon the defendant's motion to dismiss, heretofore filed herein, was called up for hearing and was argued by counsel, whereupon, after due consideration, Court ordered that said motion to dismiss be denied and that the defendant be granted an exception to the Court's ruling.

Thereupon, the policy sued upon, marked Plaintiff's Exhibit No. 1, was offered in evidence, where-

upon defendant objected to the introduction of any evidence herein for the reason the Court has no jurisdiction of the subject matter of this action, and for other [28] reasons stated. Thereupon Court ordered that the objection be overruled and the defendant granted an exception to the Court's ruling.

Thereupon Plaintiff's Exhibit No. 1 was received in evidence without objection. Plaintiff's Exhibit No. 2, being a certain statement from the Anaconda Copper Mining Company, showing the earnings of Jakor Aleksich for the years 1943 and 1944, was offered and received in evidence over the objection of defendant, and an exception granted defendant.

Thereupon Mike Pezelj and Julian H. Heilbronner were sworn and examined at witnesses for the plaintiff, whereupon plaintiff rested.

Thereupon defendant moved the Court to direct a non-suit herein or to dismiss the action, for the reason that the Court has no jurisdiction of the subject matter of this action, and for other reasons stated, whereupon Court ordered that said motion be denied and an exception granted defendant.

Thereupon the defendant offered no evidence and rested.

Thereupon, the plaintiff having this day served on counsel for defendant and filed herein, its brief in chief, it is ordered that defendant be granted twenty days from this day within which to prepare, serve and file an answering brief; that the plaintiff be granted ten days, after service upon her of de-

fendant's brief, within which to prepare, serve and file a reply brief if so advised, and that upon the filing of the final brief, or the expiration of the time granted therefor, the cause will be deemed submitted to the Court for decision.

Court further ordered that each of the parties be granted until the time for filing the final brief herein, within which to submit to the Court proposed findings of fact and conclusions of law.

Entered in open Court at Butte, Montana, May 23, 1946.

H. H. WALKER,
Clerk. [29]

Thereafter on August 14, 1946, the Opinion of the Court was duly filed herein, being in the words and figures following, to-wit: [29-a]

[Title of District Court and Cause.]

OPINION

Plaintiff contends that the decedent in his lifetime acquired a cause of action against the defendant because of a policy of insurance written by defendant, insuring the decedent for loss of time from bodily injury through accidental means. Plaintiff alleges in her complaint that decedent, while at his work, received bodily injuries which caused his death within an hour after such injuries were inflicted upon him; that at that time his expectancy of life was 16.5 years, and except for the injuries he would have lived that time, was employ-

able and would have continued to receive compensation for his work and that the present worth or value of that time to him is in excess of \$24,000.00.

The correctness of plaintiff's position requires a construction of the contract and a determination of its meaning under the laws of the State of Montana, they being controlling here as the case is in this court solely by virtue of diversity of citizenship and the state law controls here. The state law controlling the decision here is in part what the Supreme Court of the State of Montana says it to be. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. This court is controlled in this case by the pronouncements of the Supreme Court of the State of Montana and in that respect this court sits as but another inferior court of the State of Montana. *Erie Railroad Co. v. Tompkins*, *supra*. [29-b]

It appears that an action was heretofore commenced in the State Court on this same policy against the defendant by the present plaintiff, she then suing as the beneficiary named in the policy, and in the prayer of her complaint filed in the State Court she asked damages based on indemnity of \$40.00 for the first month and \$80.00 for each of the succeeding 23 months, for time lost by Jakor Aleksich on account of his being injured, this apparently under the provisions of Part B of the policy in evidence here as Exhibit 1. A demurrer to the complaint was sustained by the trial court and an appeal taken to the Supreme Court of Montana. The appeal called for a construction of the

policy by the Supreme Court as the action in this court does. The contention made by plaintiff there is the same as made here, i.e., that the insured suffered a loss of time after his death for 24 months, for which he was insured under the policy. The Supreme Court, in construing the policy, denied the contention made there and here. It directly held that the contract between the parties contemplated that the benefits would insure only to the insured during his lifetime and during the continuance of his disability and while he was alive to directly receive the payments. There, as I read the decision, the Supreme Court held that any loss of time suffered by the insured after his death was a loss of time caused by his death, and not by injuries, and the policy did not insure against loss of time occurring after death. The Supreme Court said, "From a careful consideration of the entire contract we are unable to find any agreement of indemnity against, or promise of reimbursement for death of the insured, or for loss of time resulting from death", and denied recovery. *Aleksich v. Mutual Benefit Health & Accident Association* (..... Mont.) 164 Pac. (2d) 372.

The Supreme Court of Montana thus held that under the law of Montana the insured was not insured by the defendant under the policy sued on here for a period of 24 months after his death. It seems to the Court that for the Court to hold in the face of that decision that the insured was insured under this same policy for his [29-c] expectancy of life or a period of 16.5 years after his

death or any other period of time after his death, it could only do so by construing the policy, and in so construing it, coming to a diametrically opposed view of its legal effect and meaning under the law of the State of Montana. The construction I might have placed on the contract had the Supreme Court of Montana not spoken is of no importance in view of the fact that a court whose decisions control mine as to what the law of the State is has spoken on the question.

Because of the law as established by the Supreme Court in the case herein referred to, it necessarily follows that the action must be dismissed. Findings of fact and conclusions of law and judgment in accordance herewith.

R. LEWIS BROWN,

U. S. District Judge.

Filed Aug. 14, 1946.

/s/ H. H. WALKER,

Clerk. [29-d]

Thereafter, on August 14, 1946, the Court filed its Findings of Fact and Conclusions of Law herein, being in the words and figures following, to-wit:

[Printer's Note]: Finding of fact and conclusions of law set out on pages 37 to 41.

Thereafter, on August 15, 1946, Plaintiff filed her Motion to Supplement Findings of Fact herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

MOTION TO SUPPLEMENT FINDINGS OF FACT

Now comes the plaintiff and moves the Court to supplement the Findings of Fact herein with an additional Finding, as follows:

FINDING NO. VIII.

That Jakor Aleksich, the insured, survived his injuries an appreciable length of time, to-wit: About one hour."

H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

NOTICE

To the above named defendant, and to Messrs. William Meyer and James A. Poore, Jr.:

Please take notice that on Monday, the 19th day of August, 1946, the plaintiff will Present to the Court at the opening of the Court, the above entitled Motion.

H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff. [35]

Service of the foregoing Motion and Notice is

hereby acknowledged, and copy thereof received this
15th day of August, 1946.

/s/ WILLIAM MEYER,

/s/ JAMES A. POORE, Jr.,

Attorneys for Defendant.

Filed Aug. 15, 1946.

/s/ H. H. WALKER,

Clerk.

Thereafter, on August 19, 1946, the Court entered
an Order granting the Motion to Supplement
Findings of Fact herein, being in the words and
figures following, to-wit:

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO SUPPLEE-
MENTAL FINDINGS OF FACT

This cause was duly called for hearing this day
on plaintiff's Motion to supplement findings of fact
heretofore filed herein, Mr. H. L. Maury being
present and appearing for the plaintiff; there being
no appearance by counsel for defendant.

Thereupon, after hearing the argument of counsel
for plaintiff, in support of said Motion, Court or-
dered the record to show: That it is ordered that
the motion of the plaintiff to supplement the find-
ings of fact of the Court heretofore made in the
language set out in its motion is granted and the

proposed finding of fact Number VIII set out in the plaintiff's motion to supplement the findings of fact is adopted by the Court as the Court's findings of fact to all intents and purposes and as fully and completely as though the same were set out in the identical language in the findings of the Court dated August 14, 1946, and the findings of fact of the Court dated August 14, 1946, are amended nunc pro tunc as of that date to include the proposed finding of fact Number VIII.

It is further ordered by the Court that on the application of Mr. H. L. Maury, counsel for plaintiff, the plaintiff be and is granted 30 days in addition to the time allowed by law, to prepare, serve and file a statement of the evidence, and statement of points relied upon, on appeal herein.

Entered in open Court at Butte, Montana, August 19, 1946.

H. H. WALKER,
Clerk. [38]

Thereafter, on August 21, 1946, a Judgment was duly filed and entered herein, being in the words and figures following, to-wit:

In the District Court of the United States, in and
for the District of Montana,

No. 178.

ALVA ALEKSICH, as Administratrix of the Estate
of Jakor Aleksich, Deceased,

Plaintiff,

vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a corporation, .

Defendant.

JUDGMENT

Plaintiff having filed her complaint in this cause, and the defendant having been duly served with summons and a copy of the complaint, and having answered, and the cause having proceeded to trial on the merits, before the court without a jury, and the court having heard and considered the evidence, both oral and documentary, offered by the parties, and considered arguments of counsel, and briefs having been submitted, and the court having made its Findings of Fact and Conclusions of Law as follows, to-wit:

FINDINGS OF FACT

I.

“That the defendant was and is a corporation,

a citizen of the State of Nebraska, carrying on a general health and accident insurance business in the State of Montana; that except for the contract and insurance policy, Exhibit 1 introduced in evidence herein, there is no evidence that the defendant carried on at any time a general life insurance business in the State of Montana.

II.

“That the plaintiff was and now is a citizen and resident of the City of Butte, State of Montana. [40]

III.

“That the amount involved in this action at law, exclusive of interest and costs, is the sum of \$24,374.91.

IV.

“That on the 6th day of October, 1943, in pursuance of an application for insurance made by Jakor Aleksich, the defendant made, executed and delivered to the said Jakor Aleksich, in consideration of the payment of premiums therein set forth, an insurance policy, introduced in evidence as plaintiff's Exhibit 1.

V.

“That on or about November 25, 1944, Jakor Aleksich sustained bodily injuries through purely accidental means in Butte, Silver Bow County, Montana, and as a result of such injuries he died within approximately one hour after sustaining the same; that at the time of his said death the said insurance policy introduced in evidence as plaintiff's

Exhibit 1 was in full force and effect. The said Jakor Aleksich had paid all of the premiums due and payable thereunder and had performed all the terms thereof on his part to be performed.

VI.

“That thereafter the plaintiff herein was duly and regularly appointed the administratrix of the estate of the said Jakor Aleksich, deceased, by an order duly given and made by the State Court having jurisdiction thereof, and at the time of the commencement of this action she was and now is the duly and regularly appointed, acting and qualified administratrix of the estate of Jakor Aleksich, deceased.

VII.

“That Jakor Aleksich at the time of his death was of the age of 56 years, 4 months and 28 days and had a normal and natural expectancy of life of 16.5 years; that he was healthy, strong and active and a miner by occupation, was employed as such and receiving for his services the sum of \$7.75 a day and had an earning capacity of such sum and except for such accidental injuries causing his death would have had and enjoyed the ability to work and earn money as a miner during his life expectancy and would have earned annually the sum of approximately \$2,000.00 per year.”

“From the foregoing facts the Court draws the following

CONCLUSIONS OF LAW

I.

“That the court has jurisdiction hereof.

II.

“That by virtue of the terms and provisions of the contract introduced in evidence as plaintiff’s Exhibit 1 the said Jakor Aleksich was insured only against such loss of time resulting from bodily injuries causing disability he sustained after infliction of such bodily injuries and prior to his death and was not insured against any loss of time resulting from his death.

III.

“That the plaintiff is not entitled to recover any judgment whatsoever against the defendant.

IV.

“That judgment should be entered herein in favor of the defendant dismissing the above entitled action and for defendant’s costs herein necessarily incurred and to be taxed by the Clerk of this Court.

“Let decree be entered accordingly.

“Done and dated this 14th day of August, 1946.

R. LEWIS BROWN,

U. S. District Judge.”

It is therefore Ordered, Adjudged and Decreed,—

1. That the plaintiff take nothing by reason of her alleged cause of action and that plaintiff’s complaint be and the same is hereby dismissed.

2. That the defendant have judgment against the plaintiff, Alva Aleksich, for its costs herein taxed in the sum of five dollars (\$5.00).

Done and dated 21st day of August, 1946.

R. LEWIS BROWN,
U. S. District Judge.

Filed and Entered Aug. 21, 1946.

H. H. WALKER,
Clerk. [42]

Thereafter, on September 23, 1946, a Notice of Appeal was duly filed herein, and copy mailed to the attorneys for the defendant, said Notice of Appeal being in the words and figures following, to-wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant, Mutual Benefit Health and Accident Association, a Corporation, and to James A. Poore, Jr., and William Meyer, its attorneys:

Notice is Hereby Given that Alva Aleksich, as administratrix of the Estate of Jakor Aleksich, deceased, plaintiff above-named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of August, 1946.

Dated this 23rd day of September, 1946.

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff. 33

Hirbour Building, Butte,

Montana.

Filed Sept. 23rd, 1946.

/s/ H. H. WALKER,

Clerk. [44]

Thereafter, on September 23, 1946, an Undertaking on Appeal was duly filed herein, being in the words and figures following, to-wit: [45]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, a final judgment was entered in the above entitled action on the 21st day of August, 1946, in favor of the defendant, Mutual Benefit Health and Accident Association, a corporation, and against the plaintiff, Alva Aleksich, as administratrix of the estate of Jakor Aleksich, deceased; and,

Whereas, on the 23rd day of September, 1946, the said plaintiff above-named filed her notice of appeal from the judgment so entered in the above entitled action on the 21st day of August, 1946, with the Clerk of the above entitled Court, and has thereby appealed to the United States Circuit Court

of Appeals for the Ninth Circuit, from said judgment.

Now, Therefore, in consideration of the premises, and of said appeal, we, the undersigned residents of the State of Montana, do hereby jointly and severally undertake and promise, in the sum of Two Hundred, Fifty (\$250.00) Dollars, to secure the payment of costs if the said appeal is dismissed, or the said judgment affirmed, or of such costs as the Appellant Court may award if the judgment is modified, not exceeding, however, the said sum of Two Hundred Fifty (\$250.00) Dollars.

Witness our hands this 23rd day of September, 1946.

/s/ CARL SPILLUM.

/s/ PAUL CANNON.

Filed Sept. 23rd, 1946.

/s/ H. H. WALKER,

Clerk. [46]

State of Montana,
County of Silver Bow—ss.

Carl Spillum and Paul Cannon, sureties on the above and foregoing undertaking on appeal, being severally sworn, each for himself says:

That he is a resident and freeholder within the State of Montana, and is worth the sum specified in the foregoing undertaking as the penalty thereof

over and above all his just debts and liabilities, and exclusive of property exempt from execution.

/s/ CARL SPILLUM.

/s/ PAUL CANNON.

Subscribed and sworn to before me this 23rd day of September, 1946.

[Seal] L. B. ESSELSTYN,
Notary Public for the State of Montana; residing
at Butte. My commission expires September
27th, 1948. [47]

Thereafter, on September 24, 1946, a Statement of Points on Appeal was duly filed herein, being in the words and figures following, to-wit: [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The Court erred in ordering and entering judgment for defendant because:

(a) The law of Montana is not, and the decision of the Montana Supreme Court cited in the findings as binding on the trial court, is not, to the effect that the plaintiff administratrix could not recover for time lost through accidental means by assured, when the cause of the entire loss of future time occurred before death, though part of the time actually lost was to run after death intervened.

(b) No prior adjudication was claimed in the answer; a judgment against a person is not binding

against a personal representative though it chance that the representative appointed be the same person.

(c) When a contract is integrated, (nor any mistake, fraud, undue influence claimed) the contract means, and must be enforced for its legal meaning. The expectations of either party as to what rights it confers, or what duties it enjoins, must be disappointed if outside the legal meaning.

(d) The policy here insured Jakor against loss of time caused by accidental means. Under Montana statute it was an open policy, for it was not limited by any subsequent words in the policy.

(e) The complaint is not for loss of time caused by death—death was set out merely as a requisite of the appointment of an administratrix; the complaint is for loss of time caused in totality before death an hour later. By repeated decisions of Montana construing a statute if an actionable act causing total loss occur, and the owner of the cause of action do not die instantly, the cause of action is complete, a representative may enforce it, and recover for effects which endured, continued after intervening death of owner of the cause of action.

(f) The learned trial judge failed to distinguish between a cause of action for death existing in an heir (beneficiary here) non-existent at common law, now given by statute (Lord Campbell's Act) and a cause of action for damages for personal injuries, which died with the death of the owner at common law, but now in its entirety enforceable, and may be

commenced by a representative because of the Montana statute of survival of all causes of action.

The judgment should be reversed for new trial and to assess the loss of the assured's time through accidental means admitted to have occurred.

H. L. MAURY,

A. G. SHONE,

Attorneys of Plaintiff and
Appellant.

Filed Sept. 24, '46.

/s/ H. H. WALKER,
Clerk. [50]

Thereafter, on September 24, 1946, a Transcript of
Testimony was duly filed herein, being in the
words and figures following, to-wit: [51]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

taken at the trial of the above-entitled cause before
the Honorable R. Lewis Brown, Judge, May 23,
1946.

Appearances:

For Plaintiff H. L. Maury and A. G. Shone, Esqs.

For Defendant: James A. Poore, Jr., and William
Meyer, Esqs. [52]

Mr. Maury: If your Honor please, a week ago
I served on counsel, notice of motion to amend the

complaint by striking the words "subject, however, to all of the provisions and limitations thereafter contained" appearing on page 3, lines 2, 3 and 4; and also to strike the word "thereafter" appearing on page 3, line 5; and also by striking from Exhibit A to the complaint the comma after the word "sickness", in the caption in the third line of said exhibit.

The Court: Is there any resistance to the motion?

Mr. Meyer: There is your Honor. Has your Honor read the pleadings in this case?

The Court: Yes I have.

Mr. Meyer: Well then, you undoubtedly have read the policy which is Exhibit A, but I should add first, if the Court please, that we have no objection to the striking of the comma after the word "sickness" in the third line of the exhibit. That undoubtedly is placed in there inadvertently.

Mr. Maury: Then I'll ask that the Clerk draw a circle around that comma in the complaint and a line out to the margin and mark it "stricken out".

The Court: Well the Clerk will make the amendment.

Mr. Maury: I want it to appear plainly what was done.

The Court: Very well.

Mr. Meyer: Otherwise we object to this amendment because there is apparently no reason for it, in that the policy being made a part of this complaint, the [53] allegations of the complaint in the cause of action is based on the statements in the policy itself, subject, however, to all the provisions

and limitations hereinafter contained, whether it was alleged in the complaint or not.

Perhaps I should add that I recognize the rule that the matter of permanent amendments is within the discretion of the Court; however, here there is nothing to move the discretion of the Court in so far as this amendment is concerned and we object to the amendment being made at this time or at all.

The Court: (After argument) The motion will be granted and the amendment allowed made by the Clerk striking from the complaint the various language included in the amendment.

Mr. Maury: Will counsel agree that this instrument is the policy (handing document)?

Mr. Meyer: Before we get to that, your Honor has noticed a motion to dismiss which I think should be argued first.

The Court: Very well, proceed.

(Motion argued by Mr. Poore and Mr. Maury.)

The Court: The motion is denied and an exception is granted to the defendant.

Mr. Maury: I now present the policy which was delivered to Jakor Aleksich.

Mr. Meyer: Before its introduction, the defendant objects to the introduction of any evidence on the ground and for the reason that the Court does not have jurisdiction over the subject matter of the action, in [54] that the sum which plaintiff can recover herein cannot equal the sum of three thousand dollars exclusive of interest and costs, and the same appears affirmatively from the contract of in-

surance which is the basis of plaintiff's cause of action;

Secondly that the complaint herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

The Court: The motion is denied and defendant is granted an exception to the ruling of the Court.

Mr. Maury: Is this (handing document) the policy which was delivered to Jakor Aleksich?

Mr. Meyer: It is, Mr. Maury.

Mr. Maury: We offer it in evidence.

Mr. Meyer: There is no objection.

The Court: It may be admitted and considered read and any part referred to at any time by either counsel in the case.

Mr. Maury: I have here a statement from the Anaconda Copper Mining Company prepared by its Assistant Chief Clerk James M. Duggan. This statement shows the earnings of Jakor Aleksich for the years 1943 and 1944, the amounts paid him for his work and the number of shifts he worked, and I offer it in evidence.

I might say that counsel for the defendant have courteously agreed that we need not keep the Chief Clerk here. He was here this morning.

Mr. Meyer: We desire to object. We have agreed, your Honor, that if Mr. Duggan was here he would testify [55] this correctly shows the amount paid and the number of shifts worked by Mr. Aleksich at the time specified in this exhibit.

Mr. Maury: And that Mr. Duggan is Assistant

Chief Clerk of the Anaconda Copper Mining Company?

Mr. Meyer: Yes.

Mr. Maury: And do you agree that the Anaconda Copper Mining Company keeps and did keep a correct record of the men working for it and the amount paid different men?

Mr. Meyer: Yes.

Mr. Maury: And that Jakor Aleksich was one of its men and that this is a correct statement?

Mr. Meyer: Yes. Your Honor understands, we make no objection with reference to the authenticity of the record.

The Court: That is clear to me, yes.

Mr. Meyer: Now then the defendant objects to plaintiff's offered exhibit 2 on the ground and for the reasons that it is incompetent, irrelevant and immaterial in that under the complaint on file herein there could be no recovery for any amount under any set of circumstances in excess of or equal to the sum of three thousand dollars exclusive of interest and costs; and that the earnings and the amount of time, the number of shifts worked by Jakor Aleksich during his lifetime and particularly during the years 1943 and 1944 while employed by the Anaconda Copper Mining Company is immaterial to prove any issue in this case.

Next: That the contents of the offered exhibit No. 2 is irrelevant and immaterial for any purpose in this case for the reason that under the contract of insurance the amount which the plaintiff could recover if at all is distinctly specified in the policy

of insurance and the amount therein specified is binding upon the plaintiff, and the earnings or the amount paid Jakor Aleksich during the years 1943 and 1944 are irrelevant and immaterial for any purpose in this case.

The Court: The objection will be overruled and the exhibit will be received in evidence, and defendant is granted an exception.

MIKE PEZELJ,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. State your name? A. Mike Pezelj.

Q. What has been your occupation for the last last few years, Mr. Pezelj? A. Miner.

Q. Were you acquainted with Jakor Aleksich, sometimes known as Jack Aleksich? A. Yes.

Q. Were you working with him as a partner in the Anselmo Mine? A. Yes.

Q. How long did you work with him there as a partner?

A. It was over two years; I couldn't exactly say.

Q. What kind of a man was he as to being strong?

Mr. Poore: Just a moment. If your Honor please, we object to this as being immaterial and

(Testimony of Mike Pezelj.)

incompetent, in that the answer has admitted the physical health.

Mr. Maury: I think that is right. I'll withdraw the question. The answer has admitted that.

Q. Now Mr. Pezelj, on the morning or evening, I don't which it was, of the 25th of November a year and a half ago, were you working with Jack Aleksich? A. Yes.

Q. Whereabouts were you working?

A. We were between the thirty-six and thirty-four hundred of the Anselmo working in the stope.

Q. And that mine is in this county?

A. Yes.

Q. When you were working there what happened to Aleksich?

Mr. Poore: To which we object as incompetent, irrelevant and immaterial in that the answer admits that Jakor Aleksich was *killed* on November 25 in the Anselmo mine and that he died shortly thereafter.

Mr. Maury: The answer doesn't admit that it was accidental. They admit he survived an hour but they don't admit the injury was accidental.

The Court: If that is the purpose of this testimony——

Mr. Maury: Yes, your Honor. [58]

The Court: I'll then overrule the objection.

Q. When you and Jakor Aleksich were working that day, what happened to Jakor?

Mr. Poore: Just a moment: If your Honor please we object to the question for the reason that

(Testimony of Mike Pezelj.)

it is irrelevant and immaterial in that plaintiff's complaint does not allege that the death was accidental.

The Court: Overruled.

Q. You may answer now: What happened to Jakor Aleksich? Was it morning or evening?

A. It was evening; night shift. Well, when we come down we were looking around and just about that time the boss come down and we looked up over and it was looking kind of tough and he told us he said "One of you go up and cave the chute on the top——"

Mr. Poore: (Interrupting) We object to this as hearsay.

The Court: Yes, it is hearsay.

Q. What happened to Jakor Aleksich?

A. Well he got hit by a rock.

Q. How big a rock was it?

A. The rock was I should say about three feet wide and about eight feet long and between eighteen and twenty inches thick.

Q. When he got hit by the rock, what did the rock do?

A. Well when he got hit, the way he was standing on the timber the rock got him struck down on the timber and crushed and busted.

Q. Crushed what? [59]

A. The rock busted all to pieces, didn't stay in one piece when it hit the timber; then when the rock busted like that it kind of pushed him down

(Testimony of Mike Pezelj.)

in the muck where he went down to the second set where he was pinned to the brow.

Q. What part of his body was pinned?

A. When I looked at the back to see that everything was all right I jumped down there to get some of the rocks off him, off his legs, which they were up in the muck and the top of his body was down, went down through the hole, and the rock had pinned him on the back right against that brow and cap.

Q. What if anything did he say to you?

A. He was calling for help "quick, help". When I got down there I saw I couldn't do nothing alone. I went across this old place, the old raise that was into the other stope to get the other two miners.

Q. Can you tell the Court just generally what part of Jakor's body was broken?

A. The way it looked to me it was his hips and legs.

The Court: Where did the rock come from that hit him?

A. It came right on kind of an angle from the hanging and the back.

The Court: On an angle from the back and the hanging wall, is that it? A. That is it.

Mr. Maury: That is all.

Mr. Meyer: We have no cross examination.

(Witness excused.) [60]

JULES H. HEILBRONNER,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mr. Heilbronner will you state your name?

A. Julian H. Heilbronner.

Q. What is your profession or business?

A. Insurance.

Q. How long have you followed that occupation or profession, if you can remember back that far?

A. General insurance about forty years; life insurance about thirty-five years.

Q. Have you with you the mortality tables as used by some standard life insurance company of the United States and for the north temperate zone?

A. Well yes, the United States, that is the North American zone on which we operate.

Q. Mr. Heilbronner by consulting that table can you inform the Court of the expectancy of life of a man fifty-six years and four months old?

A. Yes.

Q. Will you now examine the tables and tell the Court what is, according to the American table of statistics, mortality statistics, the expectancy of life of a man fifty-six years old?

Mr. Meyer: To which the defendant objects for the reason that the same is incompetent, irrelevant and immaterial; that it does not prove or tend to prove any issue in this case; for the further reason

(Testimony of Jules H. Heilbronner.)

that under the policy forming the basis of plaintiff's cause of action, the life expectancy of the decedent Jakor Aleksich or of any person of the age of fifty-six years is irrelevant and incompetent for any purpose in this case; and that it is further irrelevant and immaterial because the expectancy of life of the deceased Jakor Aleksich or of any person of the age of fifty-six years does not enter into or is not competent to prove any issue which is properly before the Court in this matter;

And for the further reason that the measure of indemnity to or which plaintiff herein would be entitled if at all is definitely set forth and measured in the policy of insurance attached to and made a part of plaintiff's complaint upon which plaintiff's cause of action is based.

The Court: Overruled.

Mr. Meyer: Exception.

Q. You remember the question now Mr. Heilbronner?

A. The expectancy of a man fifty-six years old?

Q. Fifty-six years.

A. At the age of fifty-six his expectancy is 16.72 years.

A. 16.72 years.

Q. Mr. Heilbronner can you inform the Court as to the customary and ordinary price charged for annuities for a man fifty-six years old by a responsible life insurance company in the United States?

A. Yes, I can. [62]

Q. And is that price which you can give based

(Testimony of Jules H. Heilbronner.)

on hundred dollars a year or one thousand dollars or what?

A. One hundred or any amount.

Q. And there is no change in rate for increase of amount?

A. No, the rates is the same.

Q. The rate would be the same if the annuity were one hundred dollars or two thousand dollars or three thousand dollars? A. Yes.

Q. And what would be with some responsible insurance company in the United States an annuity of one hundred dollars per year for a man fifty-six years old?

Mr. Meyer: To which we object, if the Court please, and without specifically stating the objection may it be understood that the grounds which were stated in our objection to the question regarding annuity and mortality tables may go this question?

The Court: Yes, it is so understood and the objection is overruled.

Mr. Meyer: An exception.

Q. Answer the quest Mr. Heilbronner.

A. Annuity for one hundred dollars annually?

Q. That is payable annually.

A. One hundred dollars payable annually would require a single premium of \$1706.60.

Q. And such income as would leave nothing when the man died? [63]

Mr. Meyer: We make the same objection.

The Court: Overruled and exception noted.

(Testimony of Jules H. Heilbronner.)

A. There would be nothing left after the man dies.

Mr. Maury: That is all.

Mr. Poore: No cross-examination.

(Witnessed excused.)

Mr. Maury: The plaintiff rests.

Mr. Meyer: If the Court please we desire to now interpose a motion for a non-suit and a dismissal of the action and as grounds for the motion we state:

1. That the Court does not have jurisdiction over the subject matter of the action, in that the sum which the plaintiff can recover herein under the proof herein adduced cannot equal the sum of three thousand dollars exclusive of interest and costs;

2. The Court does not have jurisdiction over the subject matter of the action in that the sum which the plaintiff can recover herein under any possible theory cannot equal the sum of three thousand dollars exclusive of interest and costs;

3. That the complaint herein does not state a claim upon which relief can be granted to plaintiff.

The Court: The motion will be denied and an exception will be granted to defendant.

Mr. Meyer: I suppose the record should show that the defendant rests, that we do not offer any proof.

The Court: Yes. And also let the record show [64] that the plaintiff having this day served her brief in chief upon counsel for the defendant, that

the defendant is granted twenty days from this date within which to prepare, serve and file an answering brief; that plaintiff is granted ten days after receipt of the answering brief of defendant within to prepare, serve and file a reply brief thereto if so advised; that upon the filing of the reply brief, or upon expiration of the time for the filing of the reply brief the case will be deemed submitted to the Court for its consideration and decision.

It is further ordered in this case that each of the parties to the action may have and are hereby granted time up to and including the time granted for the filing of plaintiff's reply brief in which to prepare, serve and lodge with the Clerk of this Court proposed findings of fact and conclusions of law. [65]

Thereafter, on September 24, 1946, an Order of Transmission of Original Exhibits was duly made and filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of counsel for the plaintiff and appellant above named, and it appearing to the Court that plaintiff's Exhibits numbered 1 and 2, received in evidence at the trial of the above entitled cause, should, by reason of their form and contents, be sent to the Appellate Court in lieu of

copies, under Rule 75, Sec. (i) of the Rules of Civil Procedure.

It Is Hereby Ordered that such original plaintiff's exhibits numbered 1 and 2 be, by the Clerk of this Court, duly certified to the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the said Clerk of the Circuit Court of Appeals by mail, with the record on appeal in said Court, said exhibits to be returned to the Clerk of this Court after the final disposition of said appeal, according to the practice of the Clerk of said Circuit Court of Appeals.

Dated this 24th day of September, 1946.

/s/ R. LEWIS BROWN,
Judge.

Filed and entered Sept. 24/46.

/s/ H. H. WALKER,
Clerk. [67]

Thereafter, on September 24, 1946, a Designation of Contents of Record on Appeal was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Appellant, Alva Aleksich, as administratrix of the estate of Jakor Aleksich, deceased, plaintiff

above named, hereby designates the contents of the record on appeal:

1. Complaint.
2. The order allowing amendment to complaint.
3. Answer.
4. The findings and the supplemental finding of the presiding judge.
5. All of the evidence.
6. The judgment.
7. The notice of appeal.
8. The evidence by question and answer.
9. Statement of points on appeal.
10. This document of designation.

There is filed herewith two copies of the reporter's transcript of the evidence.

Dated this 24th day of September, 1946.

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiff and appellant.

Filed Sept 24/46.

H. H. WALKER,

Clerk.

Service admitted Copy received Sept. 24/46.

WILLIM MEYER,

JAMES A. POORE, JR. M.M.

Attorneys for Appellee. [69]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I. H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 69 pages, number consecutively from 1 to 69, inclusive, is a full, true and correct transcript of all matter designated by the parties and required by rule as the record on appeal in case No. 178. Alva Aleksich, as administratrix of the Estate of Jakor Aleksich, deceased, v. Mutual Benefit Health and Accident Association, a corporation, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the costs of said Transcript amount to the sum of Fourteen and 20/100 Dollars (\$14.20), and have been paid by the appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 25th day of October, A. D. 1946.

[Seal]

H. H. WALKER,
Clerk.

By /s/ D. F. HOLLAND,
Deputy Clerk. [70]

[Endorsed]: No. 11457. United States Circuit Court of Appeals for the Ninth Circuit. Alva Aleksich, as Administratrix of the Estate of Jakor Aleksich, deceased, Appellant, vs. Mutual Benefit Health and Accident Association, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 28, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11457

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, deceased,
Appellant,
vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a corporation,
Appellee.

ADOPTION OF STATEMENT AND
DESIGNATION FOR PRINTING

To the Appellee above named, and to Messrs.
William Myer and James A. Poore, its Attorneys:
Please Take Notice that the appellant adopts as
her points on appeal the statement of points ap-

pearing in the transcript of the record, and requests that the record be printed in its entirety. However, the attention of the Clerk is called to the fact that there is a rule that no document be repeated in the printed transcript. The policy of insurance, by copy, is an exhibit to the complaint. It is also an exhibit to the Answer. Only one should be printed. All of the Findings and Conclusions are in the record twice, with the exception of the Supplemental Finding made by the Court. All of such Findings are copied into the Judgment, except the Supplemental Finding. This should not be duplicated.

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Appellant.

Service of the foregoing document admitted, and copy received, and we agree that the policy of insurance should not be printed twice, and that it is sufficient to print the Findings and Conclusions, as found in the Judgment, only once, and that the Supplemental Finding made by the Court be printed.

Dated October 31, 1946.

/s/ JAMES A. POORE,

/s/ WILLIAM MEYER,

Attorneys for Appellee.

[Endorsed]: Filed Nov. 4, 1946.

United States
Circuit Court of Appeals

For the Ninth Circuit

ALVA ALEKSICH, as Administratrix
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Appellant,
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MUTUAL BENEFIT HEALTH AND
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ration,
Appellee.

BRIEF OF APPELLANT

LOWNDES MAURY,
A. G. SHONE,
Attorneys for Appellant.

WILLIAM MEYER,
JAMES, A. POORE,
Attorneys for Appellee.
Butte, Montana.

FILED

JAN 28 1947

PAUL P. O'BRIEN,
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No. 11,457

United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administratrix
of the Estate of Jakor Aleksich, deceased,
Appellant,

vs.

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION, a corpo-
ration,
Appellee.

BRIEF OF APPELLANT

The complaint, 2 R., is on an insurance policy. The jurisdiction in the District Court arose from diverse citizenship, the plaintiff being a resident and citizen of the State of Montana; the defendant being a corporation organized and existing under the laws of the State of Nebraska. The amount involved is \$24,374.91, as claimed in the third paragraph of the complaint. A sketch of the cause of action is:

The plaintiff is the administratrix of the estate of Jakor Aleksich, who died November 25, 1944. The plaintiff was appointed January 14, 1946.

On October 6, 1943, in Silver Bow County, Montana, defendant, for a consideration in money paid to it by Jakor Aleksich, executed a written contract of insurance, and said policy was kept in force by quarterly payments until Jakor Aleksich was totally injured. These facts are admitted in the answer, 21 R. A copy of the policy is annexed to the complaint. The original policy is an exhibit certified to this Court.

It is further alleged that the defendant insured Jakor Aleksich against *all loss of time* commencing while said policy was in force, resulting directly and independently of all other causes from bodily injuries during any term of this policy through purely accidental means. There were no limitations in the said policy contained on indemnity for total loss of time commencing while the policy was in force, and it recited "This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance." That there was endorsed on the said policy when delivered to Jakor Aleksich these words, punctuated as follows:

"This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided." 4 R.

Proceeding, it is alleged that on November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in the Anselmo mine in Silver Bow County, Montana,

in the United States of America, while the said policy was in force. That said injuries were so severe as to completely, and for all times thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to therein earn any money. That Jakor Aleksich survived the said injuries an appreciable length of time, to-wit: More than one hour, and during such hour he owned a cause of action against the defendant for total loss of his time that he would have had, and could have put to valuable work but for such injuries, and during such time of his survival of said injuries he did not commence any action or suit to enforce action of collection of said cause of action. That under the law of Montana, wherein said contract was executed, such cause of action survived to this administratrix, and is now being prosecuted. Also, that no payment has been made.

It is also alleged that he was 56 years, 4 months and 28 days old; that before the total permanent injury, he was of robust health, earning \$7.75 per day, services in demand, expectancy of $16\frac{1}{2}$ years; annual earnings, \$2,015, and that he could, and would have earned \$24,374.91 had he not lost his time; that notice was given, etc.

In the answer of the defendant, found 21 R., the following admissions seem enough to reduce the contentions to two points of law. Admits that the said policy recited: "This policy includes endorsements and attached papers, if any, and contains the entire contract of insurance."

Admits that there was endorsed on said policy when delivered to Jakor Aleksich, these words: "Beware. Your policy with us is the best insurance you can buy."

Admits that there was endorsed on said policy when delivered, the following words, punctuated as follows: "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided."

Answering the allegations of paragraph 7, admits that on or about November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in the Anselmo mine, in Silver Bow County, Montana, in the United States of America, while said policy was in force. Admits that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to earn any money. Admits that said Jakor Aleksich survived said injuries for an appreciable length of time, to-wit: About one hour * * *. 22 and 23 R.

The notice to the Company of loss is admitted. 25 R.

The action was tried to the court sitting without a jury. The court made Findings of Fact and Conclusions of Law. These are copied into the judgment, and are not elsewhere repeated in the record. The court also rendered an opinion. The opinion is found 30 R. The judgment dismissing the complaint, and for costs, is found 37 R. Notice of appeal, 41 R. Bond on appeal, 42 R. The statement of points on appeal, 44 R.

The statement of points on appeal is verbatim as follows:

STATEMENT OF POINTS ON APPEAL

(a) The law of Montana is not, and the decision of the Montana Supreme Court cited in the findings as binding on the trial court, is not, to the effect that the plaintiff administratrix could not recover for time lost through accidental means by assured, when the cause of the entire loss of future time occurred before death, though part of the time actually lost was to run after death intervened.

(b) No prior adjudication was claimed in the answer; a judgment against a person is not binding against a personal representative though it chance that the representative appointed be the same person.

(c) When a contract is integrated (nor any mistake, fraud, undue influence claimed), the contract means, and must be enforced for its legal meaning. The expectations of either party as to what rights it confers, or what duties it enjoins, must be disappointed if outside of the legal meaning.

(d) The policy here insured Jakor against loss of time caused by accidental means. Under Montana statute it was an open policy, for it was not limited by any subsequent words in the policy.

(e) The complaint is not for loss of time caused by death—death was set out merely as a requisite of the appointment of an administratrix; the complaint is for

loss of time caused in totality before death an hour later. By repeated decisions of Montana construing a statute if an actionable act causing total loss occur, and the owner of the cause of action does not die instantly, the cause of action is complete, a representative may enforce it, and recover for effects which endured, continued after intervening death of owner of the cause of action.

(f) The learned trial Judge failed to distinguish between a cause of action for death existing in an heir (beneficiary here), non-existent at common law, now given by statute (Lord Campbell's Act) and a cause of action for damages for personal injuries, which died with the death of the owner at common law, but now in its entirety enforceable, and may be commenced by a representative because of the Montana statute of survival of all causes of action.

The judgment should be reversed for new trial and to assess the loss of the assured's time through accidental means admitted to have occurred.

SPECIFICATION OF ERRORS

1. The Court erred in ordering and giving judgment for the defendant that plaintiff take nothing.

2. The Court erred in holding that in its opinion that because of the law, as established by the Supreme Court of Montana in the case of Aleksich vs. Mutual Benefit Health and Accident Association, 164 Pac. (2nd), 372, it necessarily follows that the action must be dismissed.

ARGUMENT AND AUTHORITIES

Where in Montana bodily injuries are received totally impairing earning capacity, and the subject lives an appreciable time thereafter, if another is responsible because of negligence, or otherwise, to pay the loss, there are two fields from which liability springs:

1. The loss to the subject himself survived to the personal representative.

2. The other is the familiar Lord Campbell's Act, liability to pay his heirs and dependents for their loss due to his death.

We believe that the failure to observe that there are two distinct fields of liability caused the Court to err in holding that the law had been established by the Supreme Court of Montana in a previous case springing from the field analogous to the liability under Lord Campbell's Act, and would bar the action in the present field.

Our belief that the Court's ruling is untenable is based largely on the fact that having at one time been defeated by a suit brought on the same transaction in one field, and on the merits as to that field, we renewed the litigation in the other field, and such second litigation in the other field was sustained by the Supreme Court of Montana. This certainly in effect held that the previous failure, though on the merits, was not a bar to the second suit; however, if the judgment of the District Court can be sustained on any theory of the contract and findings here, then, of course, the Court of Appeals must affirm.

The argument will be addressed to the proposition that the decision cannot be sustained on any ground.

The insuring clause of the contract is, "Hereby insures Jakor Aleksich (herein called the Insured), of the City of Butte, State of Montana, against loss of limb, sight or time, sustained or commencing while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this policy, through purely accidental means, and against loss of time beginning while this policy is in force and caused by disease contracted during any term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained." 7 R. 20.

It was agreed at the trial, and we shall not argue it, that this policy must be construed by Montana law. Under such law, the provisions "Subject, however, to all of the provisions and limitations hereinafter contained," does not modify the words "Hereby insures against loss of * * * time sustained while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during the term of this policy through accidental means."

The insuring paragraph under controlling Montana decisions must be cut in two. The words, "Subject, however, to all provisions and limitations hereinafter contained," modify only insurance for "by disease contracted." These words have no effect upon liability for accidental injury, *a remote antecedent*.

This is the law written in Montana.

The rule of the "last antecedent" is here well established.

- R. M. Cobban Realty Co. v. Chicago, etc. Ry. Co.,
58 Mont. 188; 190 Pac. 988;
- State v. Continental Brewing Co., 55 Mont. 500;
179 Pac. 296;
- State, ex rel. Hinze v. Moody, 71 Mont. 473; 230
Pac. 575.

It is so well established that all lawyers, for many years, in passing on deeds, executory contracts, etc., regard it as *stare decisis*.

As to loss of time through *accident*, this policy is open or unvalued.

This claim of plaintiff was assailed in the lower court for novelty. Rejection because of novelty cannot be sustained against a plain contract of a class defined in statutes of the state where the contract is made.

"A policy is either open or valued."

Sec. 8115, R. C. M., 1935.

This is a familiar statute of many states. The text books discuss policies as open, valued or mixed. Parties can contract for any contingencies they desire so long as the contract does not offend some law or good public policy.

"The courts, in the absence of an attack upon their validity, may not interfere with such contracts as may be entered into between parties, nor may they make new contracts for them."

Pearce v. Metropolitan Life Ins. Co., 57 Mont.
79; 186 Pac. 687.

A contract of insurance made in Montana is governed by the law of Montana.

Capital Finance Corporation v. Metropolitan Life Ins. Co., 75 Mont. 460; 243 Pac. 1061.

Just as "brevity is the soul of wit, and tediousness the limbs and outward flourishes thereof," the insuring paragraph is the soul of an insurance policy.

There is much in this policy to warrant a belief in the lay purchaser that something would be paid for accidental death, but because it was not found in the soul of the contract, the Montana Supreme Court rejected our contentions about these outward flourishes.

Aleksich v. Mutual Benefit Health and Acc.,
Montana; 164 Pac. (2nd), 372.

This indicated judicial rigor in our courts to hold fast to the doctrine about integrated contracts when the validity is not put in issue.

In such the legal effect prevails, regardless of what either party believed the contract would give or take away. Either side may be disappointed when it comes to an interpretation by a court.

Restatement of the Law. Contracts p. 311, Subd. B., par. 230. (Sancho Panza to Don Quixote, "My Lord, many who go out for wool come back shorn.")

Courts divide as to enforcing policies of insurance where liability seems to be found outside of the insuring paragraph, and in promises, expressions, representations endorsed on policies, or in captions, etc. (there are such

on the one in exhibit here). The Supreme Court and this Court enforce such promises.

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167;

N. Y. Life Ins. Co. v. Hiatt, 140 Fed. (2nd) 763. (Also formerly Montana);

Park Saddle Horse Co. v. Royal Indemnity Co., 81 Mont. 99; 261 Pac. 88.

Has any court ever consciously refused to enforce a liability found in the insuring paragraph? *When by law of the locus*, it is unmodified, unlimited, or open? We think such a decision would be a *novelty* too bizarre to persuade others as a precedent.

The opinion of the learned trial judge erroneously imputes that to the Montana Supreme Court. But a careful reading of the opinion convinces otherwise in *Aleksich v. Mutual Benefit, etc.* 164 Pac. (2nd) 372. Quoting: "It is apparent that the insuring clause does not insure against death, nor does the insurer thereby agree to pay any indemnity or benefit by reason of the death of the insured. Therein the contingencies insured against are limited to *loss of limb, sight or time resulting from accident or sickness.* (Our Italics.)

Because the Montana Court refused recovery for death because it was not in the insuring clause, is not good ground for holding that it foreclosed recovery for "loss of time" due to accident which is in the insuring clause.

This complaint is for loss of time caused *by the injuries*. The answer "Admits that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor

Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to earn any money." 23 R. 8.

Then follows an admission which puts this case in the first field of liability and on which finding V.—38 R. and supplemental finding VIII.—34 R., are based. "Admits that Jakor Aleksich survived said injuries for an appreciable length of time, to-wit: About one hour."

The policy being open, unvalued, it would seem that the Court would be concerned only to determine what in law "loss of time" means, and if it is found that it means loss of earning capacity, then whether under Montana law, recovery for such may be obtained by an administrator, on a survived cause of action, though death intervened quickly, and such death was also caused by the injuries.

The occurrence of the greater loss to the injured for which the insurer did not agree to pay, does not absolve the insurer from payment of the lesser loss for which the insurer did agree to pay—in full measure. Suppose Aleksich had a horse of an expectancy of 16.5 years of robust health, hired on contract for a year at \$3 the day. The defendant insures Aleksich against loss of time of the horse resulting from bodily injuries sustained through purely accidental means. The horse is so injured under the causes fixed that his time thereafter is valueless—but about one hour thereafter he also dies of the injuries. Would the recovery be what a jury or judge would find the earning capacity of the horse to be for a reasonable

expectancy, or would the insurer be heard to say, "While the horse was injured, under the condition insured against, so severely that his time thereafter was inevitably valueless—yet he also died in one hour *of the injuries*; we did not insure against death or time loss due also to death—we are not liable at all, or if for anything, only for the one hour's time.

("The years fly swiftly by, Lorena.") I posed this question to the Montana Supreme Court in 1910 under a *special statute* of survival of a cause of action.

Beeler v. Butte & London Co., 41 Mont. 465; 110 Pac. 528.

It was answered that the *heirs*, who, *under that statute*, could prosecute the *intestate's cause* of action, could recover for loss of future capacity to earn money. "Unquestionably, his right of action included damages * * * and for his diminished and lost earning capacity for the period of his natural expectancy." Beeler died in a few minutes. Verdict, \$15,000.

Again I posed the same question in 1912 under our *general statute* of survival of all causes of action in:

Melzner, Adm. v. Northern Pacific Ry. Co., 46 Mont. 162; 127 Pac. 146.

Haddox, the injured boy, lived an appreciable, but very short time (minute or two). The question was, as to damages, answered by the Montana Supreme Court by quoting from a Pennsylvania case.

"It logically follows that the damages recoverable by her personal representative should be the same as she could have recovered had death not ensued. Included therein are damages for pain and suffering up to the time of her death and diminution of earning power during a period of life which she would probably have lived had the accident not happened." Affirmed for \$14,000.

This leading case has been often followed in Montana.

Autio v. Miller, 92 Mont. 150; 11 Pac. (2nd) 1039.

In fact, this Court has followed it.

Swift & Co. v. Daly's Adm'x., 44 Fed. (2nd) 40, (verdict for \$5,000.)

Though the point was not there raised because too well settled.

The statute on which these cases are based has not been repealed. (To save space, we ask opposing counsel to answer.)

"Loss of Time" is loss of earning capacity.

The popular and technical legal meaning correspond.

Galveston H. & S. Ry. Co. v. Eubanks (Tex. Civ. App.) 42 S. W. (2nd) 475.

"The rule is well settled that in the case of a professional man, the proper measure of damages for loss of time is the amount he would have earned by the practice of his profession."

Burlington Transp. Co. v. Josephson, 153 Fed. 2nd, 372. Citing text book.

There is no doubt but that insurance against loss of time means insurance against any and all loss of time. If there were doubt it is resolved by the Supreme Court in

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, and

"If the Company, by the use of the expression in the policy, leaves it a matter of doubt as to the true construction to be given the language, the Court should lean against the construction that would limit the liability."

London Assurance Co. v. Companhia, etc., 167 U. S. 149, p. 159;

John Hessler, Adm. v. Federal Casualty Co. (Ind.) 129 N. E. 325;

American Liability Co. v. Bowman, 114 N. E. 992; Canton Ins. Office, Ltd. v. Woodside, et ux. (CCA 9th) 90 Fed. 301.

The rule of the last antecedent is not confined to Montana.

Vickers v. Electrozone C. Co. (N. J.), 52 Atl. 467 wherein is cited Parsons on Contracts, Clark on Contracts, Story on Contracts.

Passing from argument on what we submit is an absolute liability flowing from the insuring clause, there are other features of this document confirming our view and on which the courts now base liability, and the same measure of liability as springs from the soul of the policy in exhibit.

The tradition is unfounded "that punctuation is no part of a contract."

Tidal Oil Co. v. Roelfs (Okla.), 187 Pac. 486;
 Joy v. St. Louis, etc., 138 U. S. at p. 31.

Looking at the caption in bold type (punctuated as we now do) "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided." Regardless of the rule of the last antecedent, without any comma after "sickness" "as herein provided" grammatically does not modify "loss of time by accidental means."

Above these words in larger type appear:

PERFECT INCOME POLICY.

Now the perfect income policy for this working man would insure him and his estate against loss of time, i. e., earning capacity, due to accidental means. This Court has said that it is not enough to point the admonitory finger at such as, for gain, thus snare the unwary.

Insurance is now of Interstate Commerce. They say this is a "Standard Policy." If so, the snare is set in every state.

Omit the words "Perfect Income Policy," the same snare is set (for cultured men who know grammar and correct punctuation), as an endorsement on the back of the policy.

The answer admits that there was a rider pasted on the policy when it was delivered, as follows:

"BEWARE,

Your policy with us is the best insurance you can buy."

This Court knows that for a century there could and can be bought by any man, without medical examination, and regardless of occupation, an annuity for life equal to the earning power here.

Well did Mr. Justice Brandeis say in an essay 30 years ago, "The life insurance reserves are a menace to American Economy."

The Montana Supreme Court has not spoken on the phases of liability presented here.

There is no prior adjudication pled in the answer.

A final judgment in one of the fields from which liability in this state springs, has no bearing under our law as to liability in the other field. We speak with the assurance of having made a laboratory experiment.

The writer prosecuted and lost on the merits, the case of *Haddox v. Northern Pacific Ry. Co.*, 43 Mont. 8; 113 Pac. 119.

We then, after the appointment of an administrator, brought suit on the same transaction in the other field, and recovered on the merits, a final judgment for \$14,000 in the Supreme Court of Montana.

Melzner as administrator v. Northern Pacific Ry. Co., 46 Mont. 167; 127 Pac. 146.

In the Court's opinion in the prior suit on this policy for the beneficiary for death of the insured (in one field), there is no language denying liability in the other field.

No argument or citation of authority was made to the Court concerning liability arising in the other field. If

the Court had expressed itself about such liability, it could not shine above the twilight of obiter dictum.

“An obiter dictum is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it.”

This was said of its own obiter dictum.

Empire Theater Co. v. Cloke, 53 Mont. 183 at p. 191; 163 Pac. 107;

U. S. ex rel. Johnston v. Clark County, 96 U. S. 211.

Milando v. Perrone, C. C. A. 2nd; 157 Fed. 2nd 1002.

The Montana Court does say:

“We are convinced that the intention of the parties to the contract was that the only indemnity contemplated was for loss of limb, sight *or time*, and that such is the meaning of the contract as therein expressed.” (Italics ours.)

The administratrix is now suing for Jakor Aleksich’s loss of time due to the accident and the total permanent injuries sustained thereby—his death is basis of her appointment—not the basis of the liability.

Again the Court says:

“It is thus apparent that even though the policy should be considered broad enough to include indemnity for loss of time resulting from death, the only possible cause of action, under the circumstances, would be in favor of the estate of the insured.”

The opinion speaks several times of loss of time due to death. It nowhere asserts absence of liability to indemnity for loss of time caused by accidental injuries.

“The doctrine of *res judicata* is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available, or of the proper form of proceeding. In such situation, the plaintiff is entitled to bring the proper proceeding to enforce his cause of action.”

30 Am. Jur. 210.

“The general rule is that a judgment rendered because of defect of parties, does not operate to bar a subsequent action. This rule prevails whether the judgment is based upon a want of parties, a misjoinder of parties, a temporary disability of the plaintiff to sue, or a mistake of the plaintiff as to the character or capacity in which he brings suit.”

30 Am. Jur. 211.

Being less bashful than the farm boy at the carnival, I freely confess that in suing for the beneficiary for death benefits, I did not guess correctly which shell the pea was under. But I was lured on by earnest, cunning words of the “confidence man.” So artful that one of the ablest Judges ever on our Supreme Bench, Judge Angstman, still believes that there was a pea under that shell.

The policy recited:

“This policy does not cover death * * * sustained in any part of the world except the United States and Canada.”

"In event of accidental death, immediate notice thereof must be given to the Association."

"The Association shall have the right and opportunity * * * to make an autopsy in case of death where it is not forbidden by law."

"Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured."

And then what was perhaps the acme of deceit to the insured, as recited in the application, he was put through a pantomime; he was asked to name and give address of his beneficiary—to which he answered: "Alva Aleksich, Murray Hospital."

In the deathless classic, "The Vicar of Wakefield," the Lord of the Manor, a heartless rake, thought he was deceiving the vicar's innocent daughter by a mock marriage. In the charming climax, it turned out that the celebrant of the ceremony (though woefully fallen from grace), was an actually licensed Priest, and my Lord was married to the young lady.

There is no claim of mistake of the defendant in uttering this policy, or of deceit or undue influence on the part of the insured in buying an article moving in interstate commerce. The legal tenor of the contract does call for more than the Company expected to pay, but for much that it pretended to assure, it intended to pay nothing.

Men who formulate with careful study, contracts so cunningly worded as to deceive a learned judge, and use them as bait to entrap, deserve no sympathy when the

actual legal interpretation of their contracts is found to require a payment of more than the Courts would have required if all parts of these contracts had been fair and honorable.

We submit that the judgment should be reversed with direction to assess the value of the insured's time lost because of the accidental injury, according to the established law of Montana, i. e., his earning power for his expectancy, having regard that in manual labor, the ability to work decreases with age, and give judgment accordingly.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, Deceased,
vs. Appellant,

MUTUAL BENEFIT HEALTH & ACCI-
DENT ASSOCIATION, a corporation,
Appellee.

BRIEF OF APPELLEE

WILLIAM MEYER,
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Attorneys for Appellee,
Butte, Montana

Filed.....

....., Clerk

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United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, Deceased,
Appellant,
vs.

MUTUAL BENEFIT HEALTH & ACCI-
DENT ASSOCIATION, a corporation,
Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Alva Aleksich as Administratrix of the estate of Jakor Aleksich, deceased, brought an action in the District Court of the United States in and for the District of Montana, Butte Division, against this appellee, alleging diversity of citizenship (R. 2); that Jakor Aleksich died as the result of accidental injuries about one hour after an accident (R. 5); that Jakor Aleksich owned an insurance policy, in force at his death, insuring him against "all loss of time, commencing while said policy was in force, resulting directly and independently of all other causes from bodily injuries during any term of this policy through purely accidental means;" that the policy

contained no limitations "on indemnity for total loss of time;" that the policy was an "open policy as to indemnity for total loss of time" (R. 4); that there was due to the estate of Jakor Aleksich under the policy \$24,374.91 (R. 7).

The defendant denied that there were no limitations in the policy on indemnity for loss of time; denied that the policy was open as to indemnity for loss of time (R. 22), and denied that the plaintiff was entitled to \$24,374.91 or any other sum or amount (R. 25).

The matter was tried before the court without a jury, and the court found that the plaintiff was not entitled to any judgment against the defendant and ordered the action dismissed.

Judgment was entered for the defendant (R. 37) and the plaintiff appealed from the final judgment within the time allowed (R. 41-42).

QUESTIONS PRESENTED ON APPEAL

I.

Upon all of the record was the trial court correct in holding as a conclusion of law "That by virtue of the terms and provisions of the contract introduced in evidence as plaintiff's Exhibit 1, the said Jakor Aleksich was insured only against such loss of time resulting from bodily injuries causing disability (as) he sustained after infliction of such bodily injuries and prior to his death and was not insured against any loss of time resulting from his death?"

Although the Appellee doubts that the Appellant's first Specification of Error (R. 6) conforms with Rule 20 (d) of this Court (See: *United States v. Cushman*, 136 Fed.—2d—815,—1943), and Appellee believes that it raises no question to be determined, it will be treated in this brief as if it raised the question as stated above.

II.

Was the trial court bound by the decision of the Montana Supreme Court in *Aleksich v. Mutual Benefit Health and Accident Association*,.....Mont....., 164 Pac. (2d) 372, 162 A. L. R. 263 (1945)?

SUMMARY OF APPELLEE'S ARGUMENT

I.

THE DECEASED WAS INSURED FOR LOSS OF TIME ONLY BETWEEN TIME OF INJURY AND DEATH

This is neither a cause of action for death granted to an heir or beneficiary by Lord Campbell's Act, nor a cause of action for damages for personal injuries. This is a suit on an insurance policy providing benefits to the insured "at the rate of Forty Dollars for the first month, and at the rate of Eighty Dollars per month thereafter, but not to exceed twenty-four months," if such injuries as described in the insuring clause, do not result in any of the specific losses mentioned in "Part A" of the policy,

but "wholly or continuously disable the insured for one day or more." The defendant is not a tortfeasor, but is bound by a contract, which is governed by the law of contracts, not torts. No provision of the contract, nor any possible construction of it, makes provision for the benefits which the plaintiff claims.

II.

THE TRIAL COURT WAS BOUND BY THE CONSTRUCTION GIVEN THE POLICY BY THE MONTANA SUPREME COURT

No question of prior adjudication of this case is raised here. There is no question of *res adjudicata*. But it is the law of the United States since *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) that the Federal Court is bound by the interpretation of this contract given to it by the Montana Supreme Court, which has stated:

"From a careful consideration of the entire contract we are unable to find any agreement of indemnity against, or promise of reimbursement for the death of the insured, or for loss of time resulting from death."

ARGUMENT

I.

First Specification of Error

The Appellant makes much of the fact that the doctrine of the "last antecedent" is recognized in Montana. By aid of that doctrine she would have the insuring clause of the policy divided into two parts after the words "through purely Accidental Means," and would have the clause "subject, however, to all the provisions and limitations hereinafter contained" modify and relate only to "and against loss of time beginning while this policy is in force and caused by disease contracted during any term of this policy."

The appellant's contention ignores important facts.

First, the construction of this contract does not require the application of the doctrine of the "last antecedent" since the intention of the parties is clearly expressed by the use of the word "*respectively*" appearing immediately before the clause "subject, however, to all the provisions and limitations hereinafter contained," and between it and the single clause which the appellant would have the last clause modify. The word "*respectively*" calls attention to and refers back to the first clause of the sentence also, concerning loss of limb, sight or time. The contention of the appellant gives no meaning whatever to the word "*respectively*," but its presence in the sentence, and the only meaning it can be given are direct refutations of the appellant's theory.

Funk & Wagnall's New Standard Dictionary defines "respectively" as follows:

"As singly or severally considered; singly in the order designated—."

Martien v. Porter, State Auditor, et al., 68 Mont. 450, 479; 219 Pac. 817, 829 (1923).

It must, to be given any meaning at all, refer to more than one thing, and could properly refer only to the total group of losses enumerated.

The doctrine of the "last antecedent" is a rule of construction, and, as such, is to be used only where a document is ambiguous and in need of interpretation.

Ulmen v. National Surety Co. of New York, 3 F. Supp. 348 (D. C. Mont. 1933);

Dick v. King, 73 Mont. 456; 236 Pac. 1093 (1925);

Brown v. Homestake Exploration Corporation, 98 Mont. 305; 39 Pac. (2d) 168 (1934).

There is no ambiguity about the insuring clause of the contract here involved. The word "respectively" emphasizes the fact that the last clause modifies both of those preceding it and not merely the latter one. In addition, the sentence is properly punctuated to indicate a reference to both prior clauses, even without consideration of the word "respectively." A restrictive clause must be set off by a comma, when it refers to several antecedents which are themselves separated by a comma.

Tidal Oil Co. v. Roelfs, 77 Okl. 183; 187 Pac. 486, 487 (1920);

St. Louis-San Francisco Ry. Co. v. Bengal, 145 Okl. 124; 292 Pac. 52, 53 (1930).

As the proper grammatical meaning, both as it is punctuated, and as emphasized by the word "respectively," is unambiguous, there is no need for construction, and the doctrine of the "last antecedent" has no application.

Application of the appellant's contention would lead her to consider not only the loss of time by reason of accident, but also loss of limb and loss of sight to be unlimited, as they are not in the clause to which the appellant says the qualifying clause applies. Using that reasoning, all of the provisions of the policy beginning with the bold typed heading "ACCIDENT INDEMNITIES" and continuing through "Part A" covering specific losses of limb or sight; Part "B," covering this case, and parts "C," "D" and "E" must be considered as no part of the policy and of no effect.

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

R. C. M. (1935) Section 7532.

Secondly, the doctrine of the last antecedent is not an arbitrary rule of law providing that relative and qualifying words, phrases and clauses are never to be applied to any but the word or phrase immediately preceding it. The true statement of the doctrine as set forth in *State v. Centennial Brewing Co.*, 55 Mont. 500, 513; 179 Pac. 296, 299 (1919), cited by the appellant, is as follows:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding and are not to be construed as

extending to or including others more remote, *unless such extension is clearly required by a consideration of the entire act.*" (Italics supplied.)

Such extension is required here by use of the word "*respectively*," by the punctuation, and also by the tenor of the whole instrument.

Predicating her reasoning on the elimination of the word "respectively" and a misuse of the doctrine of the "last antecedent," the appellant contends that the policy is an "open policy" as to indemnity for loss of time caused by accident.

The appellant does not cite R. C. M. (1935) Section 8116, which defines an "open policy" as follows:

"An open policy is one in which the value of the *thing* insured is not agreed upon, but is left to be ascertained in case of loss." (Italics supplied.)

The statute by its wording shows that insurance of persons is not contemplated. This policy covers a *person*, not a *thing*.

It is to be noted that the appellant has cited no case involving an "open policy." The appellee has searched diligently but has been unable to find any case or text which refers to an "open policy" except where the policy involves insurance of property rather than the insurance of persons. It is a fair inference that when neither party is able to find such a case or text that none exists.

In view of the fact that this definitely is not an "open policy" none of the cases cited by the appellant, referring to the measure of damages in tort actions, are applicable to this case.

The appellant refers in her brief (pages 7, 13 and 14) to distinctions between a statute giving the legal representative of a deceased person a right to prosecute a cause of action which the deceased possessed before death, and a statute specifying that the heir of a deceased person is the proper party to prosecute an action for his wrongful death. These statutes are not cited by the appellant, and the appellee believes they are irrelevant to this case. It is the position of the appellee that the insured owned no cause of action against this defendant at the time of his death, not that the plaintiff is not the proper party to bring an action if one had existed.

The appellant has intimated in her brief that there is a distinction to be made in this case between loss of time by reason of death and loss of time by reason of accident. We will show hereinafter that the Montana Supreme Court has considered and construed this contract fully, and, because it is an accident policy, and because the matter of loss of time is specifically confined by the contract to loss by accidental means, the Supreme Court of Montana has covered that matter, and must have considered it to make any construction of the policy. In addition, there is no merit to the attempted distinction. Contentions of this type have been made before in the history of American law, but not many of them. It is to be noted that the appellant has cited no case sustaining her theory.

In *Rosenberry v. Fidelity & Casualty Co. of New York*, 43 N. E. 317 (1896), the plaintiff, as administratrix, brought action to recover the weekly indemnity provided in

the policy although the insured died within twenty-four hours of his injury. The plaintiff's theory was that

"the estate of said Rosenberry is entitled to recover indemnity for the loss of his services for a period not exceeding 52 weeks, amounting to \$260, the same as the decedent would have been entitled to recover had he lived and continued to be totally disabled from said injuries for that period."

The court in that case said, at page 319:

"If we should concede that when the decedent was killed he was totally 'disabled,' and was consequently prevented from following his usual occupation, the consequences claimed by counsel do not, by any means, necessarily follow. If the death of Jesse Rosenberry can be said to be the fulfillment of the letter of the contract, it is far from being within its spirit and meaning. To give the contract such a literal interpretation would be to lose sight entirely of the intention of the parties as indicated by the entire scope of the instrument."

An attempt to distinguish in this type of case between loss of time, or earning capacity, *by reason of death* from such loss *by reason of the injury*, is to attempt a distinction unfounded in fact or reason. In each of the following cases, just as in this one, an effort was made to obtain indemnity for loss of time or earning capacity for a period extending after the death of the insured. Whether the loss is referred to as caused by death or is referred to as caused by accident, but continuing after death, makes no difference, as the same reasoning applies in a determination of the plaintiff's right. In all of them the court

held that the plaintiff could not recover under a theory such as the appellant presents here.

Dawson v. Accident Ins. Co. of North America, 48 Mo. App. 355, 24 A. L. R. 211 (1889);

Shaw v. Equit. Mut. Acc. Ass'n, 5 Neb. 584, 99 N. W. 672 (1904);

Hill v. Traveler's Ins. Co., 146 Iowa 133, 124 N. W. 898, (1910);

Paul v. Fidelity & Casualty Co. of N. Y., 34 S. W. (2d) 978 (Mo. 1931).

The futility of attempting such a distinction is exemplified by the second conclusion of law of the trial court in this case, which, after the plaintiff had stressed her contention just as she has done upon appeal, worded its conclusion as follows:

“—the said Jakor Aleksich was insured only against such loss of time *resulting from bodily injuries* causing disability (as) he sustained after infliction of such bodily injuries and *prior to his death* and was not insured against any loss of time *resulting from his death.*” (R. 40) (Italics supplied.)

It is apparent that the court could have used the words “continuing after his death” in place of the words “resulting from his death,” and that such would have been more in keeping with the phraseology preferred by the appellant. But it is also apparent that they mean the same thing, and, the court having found the insured was covered for loss of time prior to his death only, it is unimportant whether the loss of time after death be referred to as “resulting from death” or “continuing after death.”

Some effort is made by the appellant to predicate liability upon the caption appearing on the face of the policy and upon the back. The only cases cited by the appellant in regard to this matter are found at page 11 of her brief. The facts in each case are entirely different from those here in question. The case of *N. Y. Life Ins. Co. v. Hiatt*, 140 Fed. (2d) 752, which involved an endorsement on a policy, announced the principle that attention should be directed by the insurer to any provisions qualifying any statement in an endorsement calculated to catch attention. That principle is complied with in this case. It is also to be noted that the reverse of the court's reasoning in the *Hiatt* case, as to the thoughts which the insured might have had, is exemplified by the plaintiff's theory in this case. The average individual pays slight attention to the rules of punctuation, and it is doubtful that the lack of a comma in the heading of an insurance policy would so impress the insured that he would think immediately of the rule of the "last antecedent" and come to the conclusion that the policy was an "open policy" with regard to everything except loss of time by sickness. The *Hiatt* case was also predicated upon the principle that where a contract is partly written and partly printed, the writing controls, and that the rule embraces the use of a rubber stamp in lieu of writing. No such set of facts exists in this case. The other two cases, cited at page eleven of the appellant's brief, are not relevant to any issue in this case.

The wording of the caption is a short, very general statement of the scope of the policy. To ascertain the

contract made by the parties, anyone would naturally look to the provisions following and not merely at the caption. The specific clause stating the terms of the agreement appears directly below the caption in good-sized, legible type and clearly expresses the true agreement of the parties in plain, unambiguous, properly punctuated language.

The appellant attempts to enlarge this contract from one paying a maximum of twenty-four months indemnity as provided in part "B," amounting to \$1,880.00, and for which Jakor Aleksich paid \$21.50 the first quarter and \$16.50 each quarter thereafter, to a policy indemnifying against loss of life and paying \$24,374.91, and predicates her reasoning entirely upon punctuation of the caption and utter disregard of words and clauses of the contract which refute her contention.

In *Holmes v. Phenix Ins. Co.*, 98 Fed. 240, 241 (1899), the court stated:

"Punctuation is no part of the English language. The Supreme Court say that it 'is a most fallible guide by which to interpret a writing.' *Ewing's Lessee v. Burnet*, 11 Pet. 41, 54, 9 L. Ed. 624. The Century Dictionary tells us, what is common knowledge, that 'there is still much uncertainty and arbitrariness in punctuation.' It is always subordinate to the text, and is never allowed to control its meaning. The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and, after that has been done, punctuation may be used

to more readily point out the division in the sentences and parts of sentences.”

The following authorities indicate that the intent of the parties as it appears from the whole instrument controls over a use of punctuation which might lead to a construction contrary to that intent, if rules of grammar alone were considered.

“Punctuation, at best a most fallible guide, is always subordinate to the text and is never allowed to control its meaning.”

Stoddart v. Golden, et al., 179 Cal. 663; 178 Pac. 707, 708 (1919).

In that case, an appeal based solely on punctuation was held to be frivolous.

“The punctuation of a document, although it may aid in determining the meaning, will not control or change a meaning which is plain from a consideration of the whole document and the circumstances.”

13 C. J. Contracts, Sec. 494, page 535.

“Relative and qualifying words and phrases, grammatically and legally, *where no contrary intention appears*, refer solely to the last antecedent.—This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common-sense reading of the statute, may overturn it and give it a more comprehensive application.” (Italics supplied.)

Lewis’ Sutherland on Statutory Construction (2nd Ed.), Vol. II, Sec. 420, page 811.

As an application of these rules of construction, see *General Accident, etc., Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, 193 S. W. 1031 (1917). The clause relied upon is the first quotation set out near the middle of the first column on page 1032, and, despite the absence of a comma, the modifying phrase is held to modify several antecedents. (See page 1033-5.)

See also:

12 Am. Jur. Contracts, Sec. 256, page 799.

The court may also supply punctuation where necessary to effectuate the true intent.

See:

Powers v. First National Bank of Corsicana, 138 Tex. 604, 161 S. W. (2d) 273, 281 (1942) pertaining to a will.

In *Gordon v. Continental Ins. Co.*, 182 Okl. 240; 76 Pac. (2d) 1055, 1057 (1938), the court said:

"Punctuation marks in a policy may be resorted to as an aid in construction, but do not necessarily control, and cannot change a meaning which can plainly be gathered from the words and their arrangement. 1 Couch, Ins. Law, Sec. 185; 13 C. J. 535."

See also:

17 C. J. S. Contracts, Sec. 306, page 723.

In *Sirvint v. Fidelity and Deposit Co.*, 242 App. Div. 187, 272 N. Y. S. 555 (1934), the policy contained the following warranty:

"The assured has not sustained nor received indemnity for any loss or damage by burglary, etc."

The court held that if the assured had sustained a burglary, this clause was violated, even though he had received no indemnity therefor, and then said, at page 557:

“The intention would perhaps be even clearer if the clause ‘nor received any indemnity for’ were separated by commas. But the absence of punctuation is not fatal, where, even without punctuation the meaning is clearly expressed. * * * ‘The words control the punctuation marks and not the punctuation marks the words’.”

The appellant is asking this Court to take the following steps: (1) To create an ambiguity where none exists; (2) To read into the insuring clause after the words “resulting directly and independently from all other causes, from bodily injuries” the words “or death.” This may not be done.

Bishop v. Morrison-Knudson Co., et al., 64 Idaho 806; 137 Pac. (2d) 963, 968 (1943).

(3) Take out of the next to last line of the first paragraph of the insuring clause the word “respectively” and the commas found both before and after it; (4) Ignore the provisions of Part B and paragraphs 1, 7, 9, 10 and 11 of the standard provisions of the policy; (5) Write into the policy a provision indemnifying the loss of time (“by reason of death” as previously written in by appellant’s counsel) as measured by the earning power of the deceased assumed at an undiminished rate over the period of his life expectancy and capitalized to find present value.

Plaintiff’s theory does not amount to a construction of the contract which Jakor Aleksich had, but requires

the making of a new contract along the most beneficial lines plaintiff can imagine.

As well said by the Missouri court in *Glenn v. Missouri Ins. Co.*,.....*Mo.*.....; 179 S. W. (2d) 644, 646 (1944):

“Courts are not permitted to exercise their inventive powers for the purpose of creating an ambiguity where none exists.”

The appellant is asking this Court to take no lesser step than that.

As to the comment on the advertising label:

“Beware, Your policy with us is the best insurance you can buy,”

if the court will examine the original policy, it will see that there is nothing in that statement which would indicate to any insured anything except that was an advertisement by the insurance agent, which it shows upon its face it is. Only a portion of the sticker was pleaded by the plaintiff. In addition, it is to be noted that at page 4 of her brief appellant states that the defendant, in its answer, admitted that the words “Beware, etc.,” were *endorsed* upon the policy. The defendant admitted that the words were “*pasted*” on the policy. In any event, no statement in the advertisement governs or limits the policy in any manner.

II.

THE TRIAL COURT WAS BOUND BY THE
CONSTRUCTION GIVEN THE POLICY BY
THE MONTANA SUPREME COURT

We now invite attention to the fact that the Policy before the Court has received consideration heretofore and has been construed in an action which required a construction of the Policy and its various provisions, including those now urged by appellant's counsel for a reversal of the judgment entered herein. The facts in the former case are identical with those in the case at bar; both cases arise as a result of contract between appellant and respondent, such contract being the policy Exhibit "A" (R. 7-17) and application for insurance (R. 17-21). The complaints differ somewhat in the form and amount of relief demanded, nevertheless both actions required a construction of the policy.

The case is Aleksich vs. Mutual Benefit Health & Accident Association, 164 Pac. (2d) 372, 162 A. L. R. 263 (1945), referred to in appellant's brief. In that action, plaintiff, now suing as administratrix, sued as the beneficiary named in the Policy and there sought a construction of the Policy, whereby she would be entitled to a judgment against respondent herein for damages based on indemnity of \$40.00 for the first month and \$80.00 for each of the succeeding twenty-three months. At page 372, 164 Pac. (2d), the Montana Court summarizes the complaint in the former case as follows:

“The complaint alleges the issuance of the policy, with a copy thereof attached as an exhibit, together with a copy of the application therefor, wherein plaintiff is named as beneficiary. It further alleges the accidental injury of the insured while the policy was in effect, and his death within one hour after such injury, and that *because of such injury* and death, the said injured, Jakor Aleksich, was wholly and continuously disabled and caused thereby permanent and total loss of time.” (*Italics supplied.*)

The foregoing claim was based upon “Part B” of the Policy. Counsel for plaintiff in that action are representing plaintiff in the present action. This is important only as demonstrating that counsel apparently are hopeful that by persistent and continuous litigation they may eventually obtain a construction of the Policy which will justify some recovery.

The Montana Supreme Court gave thorough consideration to every provision of the Policy, and in the course of its decision on page 374, said:

“Plaintiff contends that the standard and additional provisions quoted above, constitute, inferentially, an agreement to indemnify, under Part B, against loss of time resulting from death of the insured.”

and after a consideration of such contention, concluded:

“We are convinced that the intention of the parties to the insurance contract was that the only indemnity contemplated was for loss of limb, sight, or time, and that such is the meaning and effect of the contract, as therein expressed. From a careful consideration of the entire contract we are unable to find any agreement of indemnity against, or promise of reimbursement *for death of the insured, or for loss of*

time resulting from death. We are unable to read into the so-called 'standard' or 'additional' provisions referred to an undertaking by the insurer to pay compensation for either of such contingencies. The purpose of including that portion of the standard and additional provisions referred to insofar as they mention death of the insured does not appear. But they do not constitute an agreement to pay for death, or loss of time resulting from death, of the insured, and are meaningless so far as this contract is concerned. They are, if given the interpretation urged by appellant, inconsistent with the clear meaning of the contract and the apparent intention of the parties thereto, and will be disregarded." (Emphasis ours.)

The foregoing language definitely rejects the construction which plaintiff would now have this Court apply to the Policy.

We have quoted somewhat extensively from the decision of the Montana Supreme Court in order to demonstrate that every phase of the contract was by that Court considered in its conclusion that there was no liability under the Policy for death of the insured or for loss of time resulting from death.

The decision of the Montana Supreme Court is conclusive upon this Court and precludes any recovery by appellant in this action.

The law as decided in

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 78; 82 L. Ed. 1188, 58 S. Ct., 817 (1938)

admits of no other conclusion. The Supreme Court of the United States there said:

“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute *or by its highest court in a decision is not a matter of federal concern.*” (Italics supplied.)

and on page 79 the Court states:

“The authority and the only authority is the state, and if that be so, *the voice adopted by the state as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.*” (Italics supplied.)

In the case of *Ruhlin vs. New York Life Insurance Company*, 304 U. S. 202, 209, 82 L. Ed. 1290, 58 S. Ct. 860 (1938), the Supreme Court of the United States approving the rule in the *Erie* case said:

“The parties and the Federal Courts must now search for and apply the entire body of substantive law, governing an identical action in the State Courts. Hitherto even in what were termed matters of ‘general’ law, counsel had to investigate the enactments of the State Legislature. Now they must merely broaden their inquiry to include the decisions of the State Courts, just as they did in a case tried in the State Court, and just as they have always done in actions brought in the Federal Courts, involving what were known as matters of ‘local’ law.”

See also:

Mutual Life Insurance Co. vs. Johnson, 293 U. S. C. 335, 79 L. Ed. 398, 55 S. Ct. 154 (1934).

The Supreme Court of Montana has decided that under the law of Montana *Jakor Aleksich* was not insured by

respondent under the policy here sued on for a period of twenty-four months after his death. If this Court, in the face of that decision, now construes the policy as holding that Jakor Aleksich was insured under the identical policy for his expectancy of life or a period of 16½ years after his death, such a construction would be diametrically in conflict with the construction placed upon the policy by the Montana Supreme Court. Under the U. S. Supreme Court decisions above cited, this Court is not privileged so to do.

We now invite attention to a brief reference to the complaint herein as originally prepared and filed. The Court will observe that in paragraph 6 thereof, counsel pleaded that the insuring clause made any indemnity to decedent "subject, however, to all of the provisions and limitations thereafter contained in the policy." It is true that the complaint was amended at the time of trial by striking said words from the complaint, but such amendment did not change the issues (R. 28). We then contended, and do now urge, and plaintiff's counsel when they prepared the complaint, must also have been of the opinion, that if plaintiff has a cause of action it must be based upon the policy as a whole, and that all of its provisions must be considered. That such is the law cannot be justly questioned. The policy is a part of the complaint; the clause in this paragraph above quoted is a part of the policy, and should not be ignored in construing the policy.

We are not here concerned, as hereinbefore stated, with a policy, the provisions of which are either ambiguous or

uncertain, neither are we concerned with a policy which does not, on its face, indicate clearly the kind of a policy it is, the indemnity provided for, and the conditions and loss insured against. Authorities construing policies of that kind are of no value in a determination of the questions here involved, and any further review of the same or comment thereon would only serve to prolong this brief.

Counsel's statement "The Montana Supreme Court has not spoken on the phases of liability presented here" (Appellant's Brief, p. 17) must be dismissed as not being supported by the facts. The decision of the Court effectively and conclusively refutes such statement. This is also true of appellant's contention here that in the argument before the Montana Supreme Court "no argument or citation of authority" was made concerning liability "in the other field." A reading of the Montana decision will disclose that the main cases cited in the brief of the appellant before this appellate court, particularly those in which policies of insurance were involved, were cited and considered by the Montana Supreme Court.

Counsel for appellant speak in their brief about the value of "obiter dictum," and with such value we are inclined to agree; nevertheless, we find that counsel immediately follow such citation by quoting from the decision of the Supreme Court of Montana what was purely obiter dictum and certainly nothing which can possibly be reconciled with or used as an authority for the position which the appellant here seeks to sustain.

We now come to a consideration of the quotations from 30 Am. Jur., found on page 19 of appellant's brief. With

the law as therein announced we have no quarrel, but the law of res judicata has no application to the facts in the case at bar. We are not here concerned with the application of that doctrine, but are concerned with the application of the rule announced in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).

CONCLUSION

The questions for determination by this court are: (1) The construction of the policy under consideration; and, (2) Is the construction of the provisions of said policy by the Supreme Court of Montana binding upon this Court. We contend that the construction placed upon the policy by counsel for appellant is not only at variance with that of the Supreme Court of Montana, but likewise does violence to the statutory rules of construction as contained in the Montana Codes and the decisions of the various courts of the country, wherein similar questions have been presented. As to our second contention, the authorities hereinabove cited announce the rule of law which is here applicable; namely, that the construction placed upon the policy here in question by the Supreme Court of Montana is binding upon this court as it was upon the Judge of the District Court. Judge Brown recognized and applied that law and rendered judgment accordingly. Such judgment should now be affirmed.

Respectfully submitted,

WILLIAM MEYER,
JAMES A. POORE, JR.,
Attorneys for Appellee.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administrator of the
Estate of Jakor Aleksich,

Appellant,

vs.

MUTUAL BENEFIT HEALTH & ACCI-
DENT ASSOCIATION, a corporation,

Appellee.

REPLY BRIEF

LOWNDES MAURY,

A. G. SHONE,

Attorneys for Appellant.

FILED

Filed.....

FEB 18 1947

....., Clerk

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administrator of the
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Appellant,

MUTUAL BENEFIT HEALTH & ACCI-
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Appellee.

REPLY BRIEF

The word "respectively" in the insuring clause means "one of two," i. e., that the Insurance Company will pay either for loss by sickness or loss by accident, but not for both coincidentally. English cannot be stretched to make it embrace anything else in that context.

Summarizing appellee's argument.

We submit, that it contends that the Court must first insert in the insuring clause, after "accidental means," the words "subject, however, to all the provisions and limitations hereinafter contained"; then the Court must insert in the caption, after the words "accidental means," the words "as herein provided"; then the Court must strike out of the caption "Perfect Income Policy"; then the Court must insert in the endorsement after "Accidental Means," the words "as herein provided"; then the Court must put a comma after "sickness" in the caption, and also in the endorsement; then the Court must decide (without plea of mistake or lack of authority of the agent)

to strike the rider "Your policy with us is the best insurance you can buy"; then if "respectively" had any such dragnet meaning claimed by counsel, it should be inserted in the caption and also the endorsement.

Then the Court must make another amendment. The words "loss of time" (due to disability perhaps) *do not occur in Part B*. But "partial loss of time" does occur in Part C. (Really it might be worth all the plaintiff claims for defendant to learn that under Part B, unless there is inserted "during such disability" after "thereafter," the defendant agrees to pay for 24 months though the total disability may exist only for one day.)

A shocking provision is found in the closing words of Part A.

"Only one of the amounts named will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity," i. e., payment of \$100 for loss of one finger absolves from payment of \$1,000 for loss of sight, if both happened in the same accident.

We allude to these features to dispel a frequent judicial approach that these contracts are carefully drawn in an effort to be fair to the purchaser. The writer was at first sight, so deluded about this one.

The defendant would constrict the meaning of the word "thing" as found in the Montana Statute about open policies, to concrete movables. No other noun has such varied meanings.

"Thing: That which may become an object of thought, whether material or ideal, animate or inanimate, actual, possible, or imaginary." Century Dictionary.

It would be correct English to say "To use the mails to defraud is not a proper thing to do," or that to sell a

man a sow's ear pretending that it is a silk purse for his beneficiary is a nasty thing to do, or "Honesty is the best policy is a thing to consider even when formulating an insurance policy." "Earning capacity is a valuable thing."

The Erie decision did not hold that Lewis-Sutherland on Statutory Construction should prevail over a decision of the highest court of the State by the law of which the contract is to be interpreted. We quote:

"Under the familiar rule of construction, known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses are to be applied to the phrase immediately preceding, and are not to be construed as extending to, or including others more remote. (*State v. Centennial Brewing Company*, 55 Mont. 500; 178 Pac. 296). The rule is applicable to the construction of deeds, as well as statutes."

Cobban Realty Co. v. Chicago, etc., Ry. Co., 58 Mont. 188; 190 Pac. 988. This case was cited in original brief of appellant. It is not criticised by appellee. On this question appellee cites three decisions, p. 6.

(1) *Dick v. King*, 73 Mont. 456; 236 Pac. 1093. The opinion does not mention the rule of the last antecedent. It has language apt to consider in this case.

"It may be that the contract * * * impose a hardship upon the defendant, but he was *sui juris* when he signed those instruments, and it is one of the privileges of every man to make unwise contracts, and many avail themselves of the privilege."

(2) Also cited, *Brown v. Homestake Ex. Co.*, 98 Mont. 305; 39 Pac. (2nd) 168. The opinion does not mention the rule of the last antecedent, but we hope the

Court will observe in it some language apt to this case about the difficulty of ascertainment of damages being no bar to recovery.

(3) *Ulmen v. National Surety Co.*, 3 Fed. Supp. 348, D. C. Mont. We suspect this case was not examined *before cited* in appellees' brief.

On page 6 appellee cites seemingly for a definition of "respectively."

Martien v. Porter, 68 Mont. 450; 219 Pac. 817.

The Court speaks of "counsel for the *respective* parties." In so doing, it conveys rather our meaning of the word "respectively" than the appellee's, i. e., either pay for accident or sickness,—not both coincidently. There is nothing else about the meaning of "respectively." We hope the Court will observe the fine quotation from Marshall, C. J. about dictum in this opinion on p. 468 of official volume.

As the Court may suspect from the opinion in *Aleksich v. Mutual Benefit Health and Accident Association*, Mont., 164 Pac. (2nd) 372, we have read an able brief of appellee claiming that because benefits *for death* were not mentioned *in the insuring clause*, none were payable, though elsewhere (11 p. 3) is found "Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured." Now we face an able brief arguing that the defendant should escape liability for "loss of time" due to accident *which is in the insuring clause*. When the joint hunt ended, the white man said to the Indian "Either you take the crow and I the grouse, or I'll take the grouse and you the crow."

In reply to the dismay expressed on page 7 that the legal logical local construction of the insuring clause would lead to impairment of the Accident Indemnities, we suggest another method of detecting fallacy of the argument about death's canceling liability for loss of time and the same fallacy in the Court's conclusion quoted on p. 11. In the same place in the insuring clause, the defendant insures against "loss of limb, sight or time." The insured, by accident, loses both feet. He dies the next week or next hour. Is defendant absolved by his death from payment for loss of feet? If the entire sight of both eyes is destroyed in a blast, would recovery be denied for loss of sight because in leaving the scene blinded for all time, he fell to his death in a winze?

Payments for loss of sight and feet are, indeed, scheduled. But even if this contract were not controlled by the Montana doctrine, "Loss of time" is not mentioned in Part B. The appellant stresses the amount of the premium as pertinent to the interpretation of the contract. Aleksich did not take part in computing reasonable prices for specific hazards.

The apologies of appellant for the wording of the caption and endorsement are not sustained by reference to decisions. No definition of a perfect income policy is vouchsafed. It is true that the only idea I could form of a perfect income policy when drawing the complaint is as described in the complaint.

We assert that no decision of any other court but that of Montana may be given any consideration if in conflict with our peculiar statute of survival, or with our decisions construing the same, or with our measures of

damages, or with our doctrine of the last antecedent. In the Erie case, the law of Pennsylvania, which the Supreme Court felt constrained to follow, was certainly against the weight of authority.

Counsel declined to agree that the statute of survival has not been repealed. It is still in effect, and as follows:

“9086. ACTION WHEN NOT TO ABATE BY DEATH, MARRIAGE, OR OTHER DISABILITY—PROCEEDINGS IN SUCH CASE. An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein, but shall in all cases where a cause of action or defense arose in favor of such party prior to his death or other disability or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the court shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.”

Sec. 9086, R. C. M., 1935.

Appellee insinuated that the decisions of Montana while applicable to torts are not applicable to liabilities created by contract. No reason is advanced. They apply in actions against railroads for injury under the safety appliance acts where the railroad is an insurer. For negligent injury by a common carrier of passengers, suit may be either for breach of contract, or in tort. The Montana

rules about damages would apply equally on either kind of action. The English language means the same in both classes of action.

If the prime judicial motive for the Hiatt decision is to continue fruitful as there embodied, this Court faces the new problem of defining what is a Perfect Income Policy. Counsel may guess right as to the knowledge of Aleksich about punctuation, though when a contract is integrated, its legal effect controls both parties. But had Aleksich no thought about a perfect income policy? So far we have found no decision defining such a policy. The Montana Supreme Court made no mention of it. The appellee has not commented on our requisites of this new kind of policy now being sold by the defendant.

Courts have refused to define fraud for fear some clever person would evade the definition and yet commit fraud.

We cannot find a definition of the "best insurance that can be bought."

None of the cases cited by appellee tell us of the nature of either of these new policies. A lack of precedent does not seem to us to justify refusal of a court to construe a contract though entirely new to the business if the words are plain English.

The placing of such representations in the most serious contracts most men make in their lives, if there is no intent to live up to them has only novelty to commend it. And the "admonitory finger" only, would encourage rather than thwart such practices so prevalent in the spirit of commercialism.

Not an authority cited by appellant is criticised by appellee or the effect we assigned it disputed. They are

not on generalizations. Every one is directly decisive of the point stated.

Finally, counsel impugn the motives of appellant's counsel. Ours are the same as theirs,—to win for the client. This tack (not tact) is in fashion perhaps before juries in criminal cases by the counsel for a defendant when his client is in a net of proof and law—but in 50 years since my first case before the Supreme Court of Montana, this is the first time I have met it in a Court of Appeals.

Policies differ much from each other. Each is somewhat a law unto itself. And now the Federal Courts are not permitted to follow general law only, a much easier task than determining what is the law of a particular state,—where sometimes not a member of the Court of Appeals has practiced his profession.

Four decisions are cited on p. 11 of appellee's brief. In not a one was an open policy before the Court. None had to pass on a "perfect income" policy (of itself necessarily an open policy). No Judge of those cases knew of our statute of survival, or of doctrine entrenched in Montana law, that a representative of a decedent may recover for destroyed earning capacity of an expectancy, though the subject die the same day of its destruction. No decision of any other state can aid much in deciding what is the law of Montana. The Court may feel some confidence in finding in appellee's brief no attack on any decision of Montana that we cite.

The judgment should be reversed.

Respectfully submitted,
LOWNDES MAURY,
A. G. SHONE,
Attorneys for Appellant.

United States
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For the Ninth Circuit

ALVA ALEKSICH, as Administratrix
of the Estate of Jakor Aleksich, deceased,
Appellant,
vs.

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION, a corpo-
ration,
Appellee.

Supplemental BRIEF OF APPELLANT

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PAUL P. O'BRIEN,
CLERK

IN THE
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BRIEF OF APPELLANT

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BRIEF OF APPELLANT

SUPPLEMENT TO REPLY BRIEF OF
 APPELLANT

“Language adopted in their policies by various insurance companies is so diverse that almost every case stands on its own peculiar facts and is incapable of any great extension as a precedent in other cases.”

North Carolina Ins. Co. vs. Terrell, (Alabama)
 150 So. 318, 89 A. L. R., 1459.

“Perfect Income Policy” and “Insures Against Loss of Time” are each sufficiently definite and certain to be enforced.

“Fully Insured” was enforced:

Kentucky Wagon Co. v. People’s Supply Co., 77
 S. C. 92, 37 S. E. 676—122 Am. St. Rep. 540.

"Do the right thing if injured man does not recover in six weeks" was declared enforceable for just about what plaintiff claims here. "Juries are constantly solving such problems."

Brennan v. Employer's Liability Assurance Corp.,
213 Mass. 365, 100 N. E. 948.

Here promisee seems to have been dead before suit was concluded.

See also:

Silver v. Graves (Mass.) 95 N. E. 289;

Noble v. Joseph Bennett Co., (Mass.) 94 N. E. 289.

"So a promise for services that a testator would leave the promisee 'full and plenty after he was gone so that she need not work' was enforced as an obligation to leave an amount sufficient to buy an annuity that would support the promisee in the mode of life to which she had been accustomed.

Williston on Contracts, par. 4.

Enforcement of contracts to care for a person for life in consideration of conveyance of realty is quite well known and favored by the courts.

White v. Massee (Iowa), 211 N. W. 839.

"A contract includes not only what the parties said, but also what is necessarily implied from what is said."

Williston on Contracts, par. 22A-37, Note 6.

"When one intention appears in one clause in an instrument, and a different conflicting intention appears in another clause in the same instrument, that intention

should be given effect which appears in the principal, or more important clause.

Williston on Contracts 624 p. 1796, Vol. 3.

What the parties think an integrated contract means as against the legal effect is irrelevant.

“The thought of man is not triable, for the devil himself knows not the thought of man.”

Williston on Contracts, par. 22. Note 3.

Appellee would strain unduly the usual meaning of the word ‘respectively’. They would have it modify (1) Loss of time due to accident; (2) loss of time due to disease, found ahead of this word in the insuring clause; (3) and also modify all that follows it in the insuring clause. It may be a scatter gun, but it does not shoot both ways at once when there are two or more things preceding it which it can modify. As an adjective ‘respective’, like all adjectives in English, is used ahead of its noun, i. e., respective counsel. When it becomes an adverb, it re-assumes its prefix meaning of “backwards,” as in ‘return’, ‘revert’, ‘recapitulate’, and is placed after what it modifies; so used in a contract construed in

Ulman v. Manheimer, C. C. A. 6, 249 Fed. 691.

Or, for instance, “counsel for appellant and appellee, respectively agreed, etc.” If any such meaning could be given it as appellee desires, it would result in an ambiguity to be resolved against appellee.

There is, in the Montana Court’s opinion, not a word denying liability for loss of time *due to accident*. It is not conceivable that the Montana Court intended to, with-

out argument, overrule its many decisions sustaining liability for future earning capacity, though quick (not instantaneous) death occur. The random remark found in it "That even though the policy should be considered broad enough to include indemnity for loss of time resulting from *death*, the only possible cause of action, under the circumstances, would be in favor of the estate of the insured," begins in the usual words of obiter dictum. It is more like an invitaion to sue than a foreclosure.

Aleksich v. Mutual Benefit Health & Accident Association,Mont.; 164 Pac. (2nd) 372.

Thus obiter dictum begins in

Freeman v. Bee Machine Co., 319 U. S., 447 at p. 453.

The lack of merit of such as a precedent is exemplified in

Moss v. Atlantic Coast Line Ry. Co. (C. C. A. 2nd), 157 Fed. (2nd) 1005.

Respectfully submitted,

LOWNES MAURY,
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Attorneys for Appellant.

No. 11458

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL W. SAMPSELL, L. BOTELER and
STEWART McKEE, Trustees of the Estate
of Christ's Church of the Golden Rule, a
corporation, bankrupt,

Appellants,

vs.

THEODORE M. MONELL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Decision by Hon. Michael J. Roche

In the District Court of the United States
Southern District of California
Central Division

No. 44,128-WM

In Bankruptcy

In the Matter of:

CHRIST'S CHURCH OF THE GOLDEN RULE,
a corporation,

Bankrupt.

ORDER APPOINTING ANCILLARY
RECEIVER

At San Francisco, State of California, in said District on the 26th day of November, 1945, upon the annexed petition of Christ's Church of The Golden Rule, a non-profit California corporation, praying for the appointment of an ancillary receiver to take charge of the property of said Bankrupt herein, the territorial limits of this court and it appearing that no notice of a hearing on said petition should be given, and that said Bankrupt has property within the territorial limits of this Court and good cause having been shown for the appointment of an ancillary receiver, it is,

Ordered, that Paul W. Sampsell and William C. Mikulich be and they hereby are appointed Ancillary Receivers to take charge of the property of Christ's Church of the Golden Rule, a non-profit California corporation, the Bankrupt above

named within the territorial limits of this Court; and it is further,

Ordered, that the duties and compensation of said Ancillary Receivers be and they hereby are enlarged pursuant to General Order 40, of the General Orders in Bankruptcy, adopted by the Supreme Court of the United States; and it is further,

Ordered, that within five (5) days after the entry of this order that said Paul W. Sampsell and William C. Mikulich shall qualify as such Ancillary Receivers by entering in into a joint bond to the United States in the sum of \$25,000.00 with such sureties as shall be approved by this Court, conditioned for the faithful performance of their official duties; and it is further,

Ordered that said Ancillary Receivers be and they are hereby ordered and directed to operate the properties of the bankrupt within the jurisdiction of the court until further order of the court; and it is further, [1*].

Ordered that the prayer of the petition be and it is hereby granted and Burton J. Wyman one of the referees in bankruptcy of this court is hereby designated and appointed referee before whom said ancillary proceedings shall be conducted.

MICHAEL J. ROCHE,
District Judge.

[Endorsed]: Filed Nov. 26, 1945. [2]

* Page numbering appearing at foot of page of original certified Transcript of Record.

[Title of District Court and Cause.]

PETITION FOR AN ORDER OF SALE
(DENTON SAWMILL)

Now come Paul W. Sampsell, L. Boteler and Stewart McKee, and respectfull represent:

I.

On November 1, 1945, the above-entitled proceeding was commenced in the above-entitled court by the above-named corporation under Chapter XI of the Bankruptcy Act, as amended, for an arrangement between the said corporation and its creditors. On November 15, 1945, in the same case, the said corporation filed its voluntary Petition in bankruptcy. Thereafter and on November 19, 1945, the said corporation was duly adjudicated a bankrupt upon said Petition, and further proceedings in the case were referred by the court to Benno M. Brink, a Referee in Bankruptcy thereof. On November 20, 1945, Paul W. Sampsell, J. Ray Files, and Stewart McKee were appointed and qualified by the court as primary receivers in bankruptcy of the estate of the said corporation. Thereafter they acted in that capacity until January 4, 1946. On January 4, 1946, Paul W. Sampsell, L. Boteler, and Stewart McKee [3] were appointed, with the approval of the court, and qualified by the court, as Trustees in Bankruptcy of the estate of the said corporation, and ever since have been and now are the duly appointed, qualified, and acting Trustees in Bankruptcy of the said estate.

II.

On November 26, 1945, upon the application of the said primary receivers in bankruptcy, ancillary proceedings in bankruptcy were commenced and thereafter prosecuted in the United States District for the Northern District of California. Thereafter and on November 26, 1945, the said District Court for Northern California appointed and qualified as ancillary receivers in bankruptcy for the Northern District of California, Paul W. Sampsell of Los Angeles and William C. Mikulich of San Francisco. Thereafter the said ancillary receivers in bankruptcy for the Northern District of California continued to act as such until 10:30 a.m. on Monday, February 18, 1946, when their duties as such ancillary receivers in bankruptcy, except to account to said District Court for the Northern District of California for their administration, were terminated, and they were superseded in office by said Trustees in Bankruptcy.

III.

Among the assets of the bankrupt estate is a sawmill located about ten miles northeast of Willits, California, comprising real estate, the machinery and equipment of said sawmill, and other personal property, purchased partly on contract from DeLancey Lewis and West Coast Redwood Corporation. Ever since July 27, 1945, and up to the time of bankruptcy, the bankrupt corporation operated the said real and personal property as a sawmill through William W. Denton as its trustee. On

November 1, 1945, when the bankruptcy proceedings were commenced, as aforesaid, the bankrupt corporation was the owner of, and in the actual possession of, the said real [4] and personal property, pursuant to contracts of sale from DeLancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation. Since the commencement of the bankruptcy proceeding, the said sawmill has been operated under the jurisdiction of the bankruptcy court by the said William W. Denton for the benefit of the bankrupt estate.

IV.

The interest of the bankrupt estate in the said real and personal property has been appraised herein as approximately \$42,000.00. The balance due on the said contracts of sale is a little less than \$30,000.00. In order to realize this apparent equity in the said property it is necessary for the Trustees in Bankruptcy to sell the said property pursuant to the requirements of Section 47a(1) of the Bankruptcy Act.

V.

The said DeLancey Lewis and Doris B. Lewis, his wife, West Coast Redwood Corporation, and William W. Denton, claim some right, title, or interest in, or lien upon, the said property, or some part thereof, adverse to the said Trustees in Bankruptcy with respect to the equity in the said property. But any such claim or claims are without right or foundation and are subordinate to the

claims of the said Trustees in Bankruptcy to the said property.

VI.

The said real property is described as follows:

County of Mendocino

Parcel #1—Lot 2, Section 30, Township 19 North, Range 14 West, M. D. B & M.

Parcel #2—Southwest $\frac{1}{4}$ of Southeast $\frac{1}{4}$ of Section 10, Township 19 North, Range 14 West, M. D. B. & M.

Parcel #3—Beginning at the intersection of the center line of the County Road with the Southerly boundary line of Section 8, Township 19 North, Range 14 West, Mount Diablo Meridian, thence along said Southerly boundary line. easterly 739.5 feet to the quarter section corner common to said Section 8 and Section 17, Township 19 [5] North, Range 14 West, Mount Diablo Meridian; thence Northerly along the Easterly boundary of the Southwest quarter of said Section 8, 1,340 feet; thence North $86^{\circ} 41'$ East 235.2 feet; thence North $74^{\circ} 16'$ East 200 feet; thence North $67^{\circ} 01'$ East 200.0 feet; thence North $51^{\circ} 32'$ East 600.0 feet; thence North $44^{\circ} 05'$ East 200.0 feet; thence North $32^{\circ} 21'$ East 200 feet; thence North $12^{\circ} 40'$ East 158.8 feet; thence North $4^{\circ} 05'$ East 179.8 feet; then North $52^{\circ} 30'$ East 78.5 feet; thence South $27^{\circ} 59'$ East 267.7 feet; thence South $21^{\circ} 18'$ West 138.0 feet; thence South $15^{\circ} 18'$ West 296.1 feet; thence South $47^{\circ} 29'$ East 141.5 feet; thence South $3^{\circ} 18'$ East 409.0 feet; thence

South 25° 10' East 90.0 feet; thence South 10° 02' East 181.5 feet; then South 28° 20' East 214.5 feet; then South 24° 46' East 132.1 feet; thence South 51° 16' East 149.6 feet; thence South 51° 38' East 289.4 feet; thence South 72° 15' East 150.0 feet; thence South 78° 58' East 201.9 feet; thence South 77° 27' East 200.6 feet; thence South 80° 44' East 149.9 feet; thence South 60° 24' East 172.4 feet; thence South 10° 52' West 120.9 feet; thence South 33° 35' West 233.5 feet to a point from which the corner common to Section 8, 9, 16 and 17, Township 19 North, Range 14 West, Mount Diablo Meridian, bears West 225.3 feet; thence continuing South 33° 35' West 140.5 feet; thence South 36° 04' East 140.7 feet; thence South 1° 13' East 150.8 feet; thence South 20° 07' East 164.6 feet; thence South 24° 15' East 156.1 feet; thence South 21° 00' East 1395.0 feet; thence South 26° 30' East 940.0 feet; thence North 59° 21' West 2200.0 feet; thence North 66° 40' West 167.0 feet; thence North 69° 28' West 137.7 feet; thence North 82° 27' West 199.6 feet; thence North 85° 22' West 92.4 feet; thence North 61° 01' West 185.0 feet; thence North 56° 18' West 106.1 feet; thence North 49° 08' West 149.4 feet; thence North 51° 42' West 178.0 feet; thence North 68° 01' West 315.0 feet; thence North 52° 23' West 304.0 feet; thence North 80° 39' West 200.0 feet; thence North 86° 40' West 163.2 feet; thence North 74° 49' West 198.1 feet; thence North 85° 59' West 198.1 feet to a point in the center line of said County Road; thence, along said center line, North 30° 27' West 199.9 feet; thence North 28° 13' West 199.9

feet; thence North 32° 19' West 200.0 feet; thence North 19° 45' West 311.7 feet to the point of beginning containing 208 acres, more or less, exclusive of that portion included in said County Road.

Parcel #4—Northeast quarter of the Southeast quarter of Section 19, Township 19 North, Range 14 West, Mount Diablo Base and Meridian.

Parcel #5—Northeast quarter of the Northeast quarter of Section 19, Township 19 North, Range 14 West, Mount Diablo Base and Meridian.

Parcel #6—Southeast quarter of the Northeast quarter of Section 19, Township 19 North, Range 14 West, Mount Diablo Base and Meridian.

The said parcels #1, #2, and #3 above described are covered by a contract of sale made and entered into the 28th day [6] of February, 1944, by and between DeLancey Lewis and Doris B. Lewis, his wife, and William W. Denton and William H. James.

The said parcels #4, #5, and #6 above enumerated are not covered by said contract of sale and are independently owned by the said Trustees in Bankruptcy.

Wherefore, the said Trustees in Bankruptcy pray that: -

1. An Order issue herein directing the said DeLancey Lewis and Doris B. Lewis, his wife, West Coast Redwood Corporation, and William W. Denton, and each of them, to appear before the above-entitled court, at a time and place specified, then

and there to show cause, if any there be, why the said property should not be sold free and clear of liens and claims thereon, or subject to liens and claims thereon.

2. Upon the hearing of the said Order to Show Cause an Order be made herein in conformity herewith.

3. The Trustees in Bankruptcy be awarded the costs of this proceeding.

4. The Trustees in Bankruptcy be granted general relief.

Dated: This day of March, 1946.

IRVING M. WALKER,
GRAINGER AND HUNT,

By REUBEN G. HUNT,
Attorneys for Trustees. [7]

State of California,
County of Los Angeles—ss.

I, Boteler, being first duly sworn, deposes and says:

I am one of the Trustees named in the foregoing Petition and make this verification for and on behalf of all of the Trustees. I have read the foregoing Petition and know the contents thereof, and the same is true to the best of my knowledge, information, and belief.

/s/ L. BOTELER,
Affiant.

Subscribed and sworn to before me this 28th day of March, 1946.

/s/ BESS A. ALDRICH,

Notary Public in and for said
County and State.

[Endorsed]: Filed March 29, 1946. Burton J. Wyman, Referee in bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [8]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE
(DENTON SAWMILL)

Upon consideration of the Petition filed herein by Paul W. Sampsell, L. Boteler, and Stewart McKee, Trustees in Bankruptcy of the estate of the above-named corporation, for an Order of Sale of the real and personal property referred to in the said Petition.

It Is Hereby Ordered that DeLancey Lewis, Doris B. Lewis, his wife, West Coast Redwood Corporation, and William W. Denton be, and each of them are, hereby required to appear before the undersigned Referee in Bankruptcy, at his courtroom on the Sixth Floor of the Grant Building, Seventh and Market Streets, San Francisco, California, on Monday, April 15, 1946, at 10:00 a.m., then and there to show cause, if any there be, why the said Petition should not be granted.

It Is Hereby Further Ordered that service of the said Petition or this Order to Show Cause shall be sufficient if copies [9] thereof are mailed to the said persons from either Los Angeles or San Francisco at least ten days prior to the date of such hearing.

It Is Hereby Further Ordered that any respondent desiring to plead, answer, or respond to the said Petition or the said Order to Show Cause shall serve and file such pleading, answer, or response at least five days prior to the date of such hearing.

Dated: This 30th day of March, 1946.

BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed April 1, 1946. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [10]

[Title of District Court and Cause.]

PETITION IN RECLAMATION

To the Honorable, Burton J. Wyman, Referee in Bankruptcy:

The petition of West Coast Redwood Corporation and DeLancey Lewis and Doris B. Lewis, his wife, respectfully shows:

I.

That West Coast Redwood Corporation, (here-

in after referred to as "Corporation"), is a corporation duly created, organized and existing under and by virtue of the laws of the State of California.

II.

That said corporation is and at all times herein mentioned, was the owner of that certain sawmill and equipment including saws, machinery and other necessary tools for use in connection with the operation of a mill located in Mendocino County, [11] California, about six miles east of Laytonville.

III.

That on or about March 22, 1944 said corporation, as seller, entered into a written agreement with William W. Denton and William H. James, as purchasers, wherein and whereby said purchasers did agree to purchase from said corporation all of said sawmill and equipment above mentioned for a total sum of fifty thousand (\$50,000) dollars; that by inadvertence said agreement excluded a provision therefrom which was understood and agreed between the parties hereto providing for the payment of the balance of the purchase price of fifty thousand (\$50,000) dollars not later than October 1, 1945 and that on or about April 6, 1944 said corporation executed an addendum to said agreement which was deposited with the Title Insurance and Guaranty Company in San Francisco with said original agreement on March 22, 1944, it being understood that the terms of said addendum were binding upon both parties to said agreement.

That said corporation is informed and believes that said addendum was in fact executed by said purchasers, and was accepted by them and that said addendum of April 6 and said agreement of March 22 constitute the agreement between the parties.

That thereafter said agreement as so modified by said addendum was assigned by said purchasers to Christ's Church of the Golden Rule, the above named bankrupt; that a copy of said agreement and said addendum are attached hereto and made a part hereof and marked "Exhibit A" and by this reference incorporated herein as fully and to the same effect as though at this point re-copied and set forth in haec verba and pleaded in legal effect.

IV.

That the said purchasers violated said agreement and defaulted in the terms thereof in the following respects: [12]

(a) That said purchasers failed to acquire from Union Lumber Company, as provided by Paragraph 12 of said agreement, the parcels of timber land under option, and allowed said option to expire, thereby materially damaging said corporation and the future operations of said mill;

(b) That said purchasers failed to make the payments in accordance with said agreement and the entire balance thereon amounting to \$27,366.70 together with interest thereon at the rate of four percent per annum from October 1, 1945 is due, owing and unpaid; that due demand and notice of said default were given to said purchasers and said

default has lasted for a period in excess of thirty days after said demand and notice.

V.

That in and by the terms and provisions of said agreement, and said purchasers did agree that in the event of any action being brought to enforce any of the terms of said agreement by either party, the prevailing party in such action should be entitled to reasonable attorney's fees to be fixed by the court and taxed as part of the costs of suit in such action; that said corporation alleges that a reasonable sum to be allowed as attorney's fees herein is the sum of three thousand (\$3,000.00) dollars.

VI.

That it is also provided by the terms of said agreement that the Lewis contract hereinafter mentioned should be assigned to said corporation as part of the consideration for the execution of said contract so that, in the event of any default of the purchasers under said Lewis contract, said corporation could protect its right by paying the balance due to said DeLancey Lewis and Doris B. Lewis, his wife, and acquire the property covered by said Lewis contract. [13]

VII.

That said purchasers assigned their interests under said contract aforesaid to said Christ's Church of the Golden Rule, the bankrupt herein, after the defaults hereinbefore mentioned occurred, and said bankrupt took said contracts subject to

said defaulted condition thereof and with knowledge of all of the foregoing matters herein alleged.

VIII.

That said agreements specifically provided that the purchaser should have no title to any of the property covered by said agreement until the full amount of the purchase price and interest should have been paid. Title was reserved in and retained by said corporation until full payment of said purchase price. That all payments made by said purchasers were, according to the terms of said agreement deemed to have been made by them as rental for said property in the event of any default thereunder.

That demand has heretofore been made on said bankrupt and the Trustees for said bankrupt for the payment of the balance due under said contract of the return of said property but they have refused and do now refuse to pay said balance or return said property.

IX.

That at all times herein mentioned said DeLancey Lewis and Doris B. Lewis, his wife, (hereinafter referred to as "Sellers"), were the owners of certain parcels of land described in that certain contract dated February 28, 1942 executed by said DeLancey Lewis and Doris B. Lewis, his wife, as first parties and sellers, and William H. Denton and William H. James as second parties, a copy of which contract is attached hereto and made a [14] part hereof and marked "Exhibit B" and by this

reference incorporated herein as fully and to the same extent as though at this point re-copied and set forth at length in *hæc verba* and pleaded in legal effect.

X.

That in and by the terms of said agreement said DeLancey Lewis and Doris B. Lewis, his wife, did agree to sell said property to said second parties named in said agreement for the sum of four thousand three hundred sixty (\$4360.00) dollars payable as therein provided. That said second parties defaulted in making the payments due under said contract and there is now due, owing and unpaid from said second parties to DeLancey Lewis and Doris B. Lewis, his wife, under said contract, and in accordance with the terms thereof, the sum of one thousand eight hundred and 61/100 (\$1811.61) dollars plus interest at the rate of six per cent per annum from August 15, 1945.

XI.

That said contract further provided that said second parties named therein should keep all the property insured for the benefit of the respective parties in insurance companies satisfactory to the sellers named therein; that said second parties failed to keep and maintain such insurance and said DeLancey Lewis and Doris B. Lewis, sellers, have been compelled to pay insurance premiums in the sum of one thousand eight hundred seven and 61/100 (\$1807.61) dollars, being necessary and reasonable insurance on said property, and also have

been forced to pay taxes on said property in the sum of one hundred twenty-eight and 88/100 (\$128.88) dollars which said second parties did agree to pay and which they failed to pay. [15]

XII.

That in and by the terms and provisions of said agreement it was specifically provided that the title to said property was to remain in and to be retained and reserved in sellers, until full payment of said purchase price and all sums due under said contract and that all additions and improvements to said property by second parties should immediately become and be the property of said sellers.

That demand has heretofore been made on said bankrupt and the Trustees for said bankrupt for the payment of the balance due under said contract or the return of said property but they have refused and do now refuse to pay said balance or return said property.

XIII.

That is is further provided in and by said contract that in the event of any action or proceeding being brought by either party to enforce any of the terms thereof, the prevailing party in such action should be entitled to reasonable attorney's fees to be fixed by the court and taxed as costs of suit in such action or proceeding.

XIV.

That said petitioners allege that the sum of five

hundred (\$500.00) dollars is a reasonable amount to be allowed as attorney's fee herein.

Wherefore, your petitioners pray that an order be made herein restoring to West Coast Redwood Corporation full and complete title of property covered by said contract aforesaid, together with all additions thereto and improvements thereof and that this court decree that said bankrupt has no interest or estate or claim therein or thereto or any part thereof or that said [16] bankrupt pay to said petitioners the full amount due under said contract together with interest thereon as hereinbefore alleged and for a further order restoring to DeLancey Lewis and Doris B. Lewis, his wife, full and complete title to the property being the subject of said real estate contract aforesaid, together with all improvements and additions thereto or that said bankrupt be directed to pay to said DeLancey Lewis and Doris B. Lewis, his wife, the said sum of one thousand eight hundred eleven and 61/100 (\$1811.61) plus interest at six per cent from August 15, 1945 together with the sum of one thousand eight hundred seven and 61/100 (\$1807.61) dollars covering said expenditures and that said bankrupt be further directed to pay the sum of three thousand five hundred (\$3500.00) as attorney's fees herein to be fixed as costs in this proceeding and for such other and further relief as may be meet and proper in the premises.

THEODORE M. MONELL,

Attorney for Petitioners. [17]

Northern District of California,
City and County of San Francisco—ss.

DeLancey Lewis, being first duly sworn deposes and says:

That he is one of the petitioners named in the foregoing petition in reclamation; that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge, excepting as to those matters therein set forth upon information and belief, and as to those matters that he believes it to be true.

DeLANCEY LEWIS

Subscribed and sworn to before me this 2nd day of April, 1946.

[Seal]

JANE M. DOUGHERTY,
Notary Public in and for the City and County of
San Francisco. [18]

EXHIBIT A

The Undersigned, William W. Denton and William H. James, both of Oakland, California, hereby offer to purchase from West Coast Redwood Corporation, a corporation, hereinafter called "West Coast", all of that certain sawmill equipment, including all saws, machinery and other necessary tools for use in connection with the operation of said mill, more specifically set forth in that inventory thereof prepared by the undersigned, together with those three certain forty acre tracts of land purchased by the undersigned from Union Lumber Company, and including the existing option cover-

ing six additional forty acre tracts of land, which option is contained in letter addressed to said West Coast and dated May 3, 1943, and filed with Reconstruction Finance Corporation, hereinafter called "RFC", in connection with the loan of said RFC to said West Coast.

1. The undersigned offer to purchase all of the foregoing, being all of the physical assets of said West Coast, for the total sum of fifty thousand (50,000.00) dollars. The undersigned agree to pay said sum in the following manner:

(a) By delivery to West Coast of a bankable promissory note in the sum of forty-five hundred (\$4500.00 dollars, payable on or before six (6) months from date, on which note said West Coast shall be able to realize said sum of forty-five hundred dollars without discount in order to enable it to pay said amount to RFC under its aforesaid loan. Said note shall be delivered on execution hereof.

(b) On the same date, the further sum of eighteen hundred twenty-two and 92/100 (1822.92) dollars, plus interest from December 27, 1943, to the Collector of Internal Revenue on account of the liability of West Coast for withholding taxes withheld from employees of West Coast;

(c) The balance by delivering to West Coast one-half the entire output of lumber and other forest products from said mill and property for a period of six months from and after the date hereof, provided, however, that the undersigned

agree to either pay in cash or in such lumber and forest products an amount sufficient to satisfy the requirements of said RFC loan to said West Coast, as a minimum monthly payment hereunder. If, at the expiration of said period of six months, the undersigned should decide to abandon operations, there shall be no obligation on them, or either of them, hereunder, save and except for one-half of the output of said mill and property or said minimum requirement of said RFC to the date of such abandonment (whichever amount may be larger), and in such event said West Coast shall have full and unimpaired title to all of the property herein agreed to be conveyed, together with such additions and improvements as the undersigned may have installed. The undersigned hereby specifically agree that all additions, replacements and improvements installed upon said property shall immediately become and be the property of said West Coast subject to the terms hereof. In lieu of the delivery of said one-half of said entire output, the undersigned may pay in cash the value thereof after satisfying said West Coast as to such value. In no event shall the monthly payments hereunder be less than the amount due R.F.C. under its loan. [19]

The decreasing balance of said purchase price of fifty thousand (50,000.00) dollars shall bear interest at the rate of four (4) per cent per annum, and the payments shall be applied first to interest unpaid and balance toward principal.

2. The undersigned further agree to improve said mill, by the addition of work, labor and ma-

terials, in a minimum value of three thousand (3000.00) dollars, and to have available sufficient operating capital in order to properly carry on the operation of said mill.

3. The undersigned further agree that none of their rights hereunder shall be assignable, except to Christ's Church of the Golden Rule without the written consent of West Coast first had and obtained.

4. The undersigned further agree to acquire from DeLancey Lewis and Doris B. Lewis, two hundred eighty-six (286) acres of land in Mendocino County, together with timber and water rights, at a price of forty-three hundred sixty (4360.00) dollars, ten acres of which shall consist of the mill-site upon which the mill of said West Coast is now located and which is now subject to a lease from said DeLancey Lewis and Doris B. Lewis to said West Coast. Said contract of purchase shall be assigned to said West Coast to be held by it as security hereunder for the performance of the obligations of the undersigned, with the understanding that said West Coast may further assign said contract of RFC as further security for its advances to West Coast. All of said assignments shall be held in escrow by Title Insurance & Guaranty Company for the account of all interested parties.

5. In the event of any default hereunder on the part of the undersigned in making any payment herein provided, and the continuance of such default for a period of thirty (30) days from and

after written notice by West Coast to the undersigned, the undersigned shall surrender all rights hereunder and all right, title and interest of the undersigned in and to the property herein agreed to be conveyed, together with the improvements, additions, betterments and replacements installed by the undersigned, to said West Coast free of any obligation hereunder and from any claim of the undersigned.

6. In the event of the acquisition of said property from DeLancey Lewis and Doris B. Lewis, as hereinbefore provided, there shall be no rental charged against West Coast for the use of said property so acquired or any thereof, and in the event of any subsequent default of the undersigned hereunder such property so acquired from DeLancey Lewis and Doris B. Lewis shall be subject to the lien of said loan from said RFC to said West Coast as though said property was owned by said West Coast.

7. The undersigned shall conduct all operations of said mill property at their own cost and expense and under their own name or names, or a name selected by them not similar to the name of said West Coast, and without any obligation or responsibility whatsoever on the part of West Coast, and the undersigned agree to carry complete and adequate insurance to protect the interests [20] of West Coast in connection with the operation of said mill by the undersigned.

8. The undersigned further agree to maintain

and carry any and all insurance required to be kept by the terms of the loan to West Coast by RFC, insuring the interests of all parties as they may appear, and all insurance premiums shall be prorated to the date of the execution hereof.

9. It is further understood that the undersigned shall have no title to any of the property hereinbefore mentioned until the full amount of said purchase price of fifty thousand (50,000) dollars and interest shall have been paid to West Coast as herein provided, at which time proper deeds and bills of sale shall be delivered to the undersigned.

Deeds and bills of sale shall be prepared and executed by West Coast and delivered in escrow to Title Insurance and Guaranty Company in San Francisco, subject to delivery upon complete performance in accordance with the terms hereof.

10. In the event of any action being brought to enforce any of the terms hereof by either party, it is further agreed that the prevailing party in such action shall be entitled to reasonable attorney's fees to be fixed by the court and taxed as part of the costs of suit in such action.

11. It is expressly understood that in the event of any default of the undersigned, as hereinbefore provided, all payments theretofore made by them hereunder to West Coast or for its account, or in the acquisition of or payment for any improvements, additions or betterments, shall be deemed to be rental for the use of the property covered hereby, and that, upon the termination of the rights of the

undersigned hereunder by reason of such default, all rights of the undersigned to any sums to paid for such additional property, improvements or betterments, shall cease and terminate.

12. The undersigned further agree to acquire from Union Lumber Company, in accordance with the terms of said outstanding option, the property therein specified, provided that said West Coast shall obtain an extension of sixty (60) days for the exercise of the option as to the next additional parcel to be obtained thereunder, in order to have available timber land for the supply of timber to said mill. All properties obtained under such option by the undersigned shall be immediately assigned and transferred to West Coast, so that West Coast may in turn subject the same to the lien of the encumbrance held by said RFC pending final consummation of this agreement, at which time such property shall be transferred to the undersigned.

13. West Coast shall have at all times the right to enter the premises covered by this agreement to inspect the same and to examine the books, papers and records of the undersigned, relative to their operation of any business conducted by them, on the premises covered hereby.

14. The undersigned agrees to keep full, true and accurate books of account reflecting the business operations of said mill property, showing completely and truly all of the timber and other products cut or removed or manufactured from or on said premises. [21]

15. The undersigned agree that they shall not remove from the premises covered hereby, or any property added hereto, any of the improvements, tools, equipment (excluding motor vehicles or livestock) or buildings of any kind or character, without the written consent of West Coast first had and obtained.

16. Performance of all of the terms hereunder is subject to any delays caused by acts of war, acts of God, strikes, lockouts or any other cause beyond the control of either of the parties hereto.

17. West Coast shall take care of and satisfy all of its outstanding obligations and indemnify and hold harmless the undersigned from all damages, loss, cost and expense occasioned by reason of any failure of West Coast to pay any of its obligations, subject to the terms hereof.

18. Any notice required hereunder to be given to the undersigned shall be mailed by United States registered mail, with return receipt requested, addressed to either or both of the undersigned, with postage fully prepaid thereon at Willits, California. Any notice required hereunder to be given to West Coast shall be mailed by United States registered mail, with return receipt requested, addressed to said West Coast Redwood Corporation, in care of Theodore M. Monell, 1085-7 Mills Building, San Francisco, 4, California.

In witness whereof, the undersigned have here-

unto subscribed their names this 28th day of February, 1944.

WILLIAM W. DENTON.

WILLIAM H. JAMES.

The foregoing offer is hereby accepted. March 22, 1944.

WEST COAST REDWOOD CORPORATION,

By A. R. PETTEY,

President,

And THEODORE M. MONELL,

Assistant Secretary. [22]

This agreement, made and entered into this 6th day of April, 1944, by and between William W. Denton and William H. James, both of Oakland, California, and West Coast Redwood Corporation, a corporation,

WITNESSETH:

Whereas, said William W. Denton and William H. James did, under date of February 28, 1944, make a written offer to said West Coast Redwood Corporation, a corporation, to purchase its sawmill, which offer was accepted under date of March 22, 1944; and

Whereas, said offer and acceptance does not express the full intentions of the parties in that it omits any provision for the payment of the balance of the purchase price in the event that the undersigned continue the operation of said mill;

Now, therefore, it is understood and agreed that said offer and acceptance may be modified to add

thereto as sub-paragraph “(d)” of paragraph “1”, the following:

“(d) The balance of said purchase price of fifty thousand (50,000.00) dollars, in the event the undersigned continue with the operation of said mill property and do not decide to abandon operations as hereinbefore provided, by delivering to West Coast one-half the entire output of lumber and other forest products from said mill and property, as the same are cut and acquired by the undersigned until the entire balance of said purchase price together with interest thereon shall have been fully paid. Provided, however, that the monthly payments hereunder, after payment in full of said RFC obligation, shall not be less than the sum of two thousand (2000.00) dollars per month, and the entire balance of said purchase price shall be fully paid to West Coast not later than October 1, 1945.

It is further understood that all cut timber on said premises may be cut and manufactured into lumber by the undersigned pursuant to the terms hereof.”

WILLIAM W. DENTON.

WILLIAM H. JAMES.

WEST COAST REDWOOD CORPORATION,

By A. T. PETTEY

And THEODORE M. MONELL. [23]

EXHIBIT B

Memorandum of agreement, made and entered into this 28th day of February, 1944, by and between DeLancey Lewis and Doris B. Lewis, his

wife, of San Mateo County, California, hereinafter called "First Parties", and William W. Denton and William H. James, both of Oakland, California, hereinafter called "Second Parties",

WITNESSETH:

Whereas, First Parties are the owners of certain properties hereinafter described, a portion of which is the millsite on which the mill of West Coast Redwood Corporation is presently situated; and

Whereas, Second Parties desire to purchase said property for the total sum of forty-three hundred sixty (4360.00) dollars, on the terms and conditions hereinafter set forth; and

Whereas, Second Parties are, under even date herewith, entering into an option agreement covering the purchase of certain mill equipment and property of West Coast Redwood Corporation; and

Whereas, said DeLancey Lewis is an insurance broker, and First Parties are willing to sell said property to Second Parties in accordance with the terms hereof, including the right to act as exclusive insurance broker for Second Parties as herein provided,

Now, therefore, it is hereby understood and agreed, by and between the respective parties hereto, as follows:

1. First Parties hereby agree to sell, assign, transfer and convey unto Second Parties the following described property situated in the County of Mendocino, State of California, to-wit:

Parcel One: Lot 2, Section 30, Township 19 North, Range 14 West, M.D.B. & M.

Parcel Two: Southwest $\frac{1}{4}$ of Southeast $\frac{1}{4}$ of Section 10, Township 19 North, Range 14 West, M.D.B. & M.

Parcel Three: All that certain property described in a deed from First Parties to Geo. J. Stempel, et ux., recorded in Book 163 of Official Records, as an exception of 208 acres not included in the granting clause of said deed.

2. First Parties agree to sell said property, together with all timber and water rights owned by First Parties, to Second Parties for the total sum of forty-three hundred sixty (4360.00) dollars, payable as follows:

Five Hundred (500.00) dollars upon the execution hereof, receipt whereof is hereby acknowledged by First Parties, and the balance in seventeen (17) equal monthly installments of two hundred twenty-seven and 06/100 (227.06) dollars, or more, plus interest on the unpaid principal at the rate of six (6) per cent per annum, principal and interest payable in lawful money of the United States, on the 1st day of each and every month commencing April 1, 1944, until the full purchase price shall have been paid. [24]

3. Sellers agree, upon payment in full for said property, to transfer the same free and clear of all liens and encumbrances, excepting easements of

record, to Second Parties, together with all improvements now on said property.

4. Second Parties promise and agree to pay said sums aforesaid at the times and in the manner above set forth, and further agree to pay all taxes and assessments charged against said property until Second Parties shall have paid in full therefor.

5. Second Parties further agree to keep the improvements on said property in good order, condition and repair, and to keep the same insured for the benefit of the respective parties hereto, as their interests may appear, in insurance companies satisfactory to First Parties.

6. Second Parties agree that all improvements installed by them on said premises, excepting movable fixtures, shall immediately become part of the realty and belong to First Parties and that Second Parties shall have no interest therein or claim thereto, or any part thereof, until payment in full of all sums due from them hereunder.

7. Second Parties further hereby appoint said DeLancey Lewis as their exclusive insurance broker, for a period of five years from and after the date hereof, to handle for them the placing of all insurance required or carried in connection with the operation of said sawmill and property and agree that no other agent or broker shall act for them, or either of them during said period, and that all insurance carried in connection with said business shall be placed through said DeLancey Lewis and not otherwise handled or placed. Pro-

vided, however, that said DeLancey Lewis shall at all times use his best efforts to effect such economies in the placing of such insurance as any other prudent insurance broker would under like circumstances.

8. First Parties further agree to execute a deed for the property hereinbefore described to Second Parties and to deposit such deed with Title Insurance and Guaranty Company, in San Francisco, with instructions to deliver same upon payment in full of all sums due hereunder to First Parties.

9. In the event of any action or proceedings being brought by either party hereto to enforce any of the terms hereof, it is further agreed that the prevailing party in such action or proceeding shall be entitled to reasonable attorney's fees, which shall be fixed by the court and taxed as costs of suit in such action or proceeding.

In witness whereof, the parties hereto have executed this agreement the day and year first herein written.

DeLANCEY LEWIS,

DORIS B. LEWIS,

First Parties.

WILLIAM W. DENTON,

WILLIAM H. JAMES,

Second Parties.

[Endorsed]: Filed April 1, 1946. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [25]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND SETTING
DAY OF HEARING.

Upon consideration of the petition of West Coast Redwood Corporation and DeLancey Lewis and Doris B. Lewis in reclamation, filed herein, with respect to the sawmill property and land near Laytonville, in Mendocino County, California, known as the "Denton Sawmill",

It is hereby ordered that Paul W. Sampsell, L. Boteler and Stewart McKee, Trustees in bankruptcy of the bankrupt above named, and said Bankrupt, be, and they are hereby, required to appear before the undersigned Referee in Bankruptcy, at his Courtroom in the Grant Building, at Seventh and Market Streets, in San Francisco, California, on Monday, April 15, 1946, at the hour of ten o'clock a. m., of said day, then and there to show cause why the said petition should not be granted.

It is further hereby ordered that service of said petition [26] and this order to show cause shall be sufficient if made by mail from San Francisco, on or before April 5, 1946.

It is further hereby ordered that any respondent desiring to contest the said petition shall serve and file herein an answer or other pleading at least five days prior to said April 15, 1946.

Dated: April 3rd, 1946.

BURTON J. WYMAN,
Referee in Bankruptcy.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Dated: April 3, 1946.

BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed April 4, 1946. Burton J. Wyman.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [27]

[Title of District Court and Cause.]

ANSWER OF TRUSTEES IN BANKRUPTCY
TO PETITION IN RECLAMATION OF
DELANCEY LEWIS, ET AL.

Now come Paul W. Sampsell, L. Boteler and Stewart McKee, the trustees in bankruptcy of the estate of the above named bankrupt corporation, and, for answer to the petition in reclamation filed herein by DeLancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, denies each and every allegation in the said petition contained.

Wherefore, the said trustees pray that the said petition be denied and for general relief.

Dated: Aug. 6, 1946.

IRVING M. WALKER,
GRAINGER & HUNT,

By REUBEN G. HUNT,
Attorneys for Trustees.

Verification of the foregoing answer is hereby
waived this 8th day of April, 1946.

Attorney for
DeLancey Lewis, et al.

[Endorsed]: Filed April 9, 1946. Burton J.
Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Cal-
breath, Clerk. [28]

[Title of District Court and Cause.]

ANSWER OF WEST COAST REDWOOD COR-
PORATION AND DeLANCEY LEWIS AND
DORIS B. LEWIS TO PETITION FOR AN
ORDER OF SALE (DENTON SAWMILL).

Come now West Coast Redwood Corporation, a
corporation, and DeLancey Lewis and Doris B.
Lewis, his wife, and file this, their answer to the
petition for an order of sale of the Denton Saw-
mill in the above matter and respectfully represent:

I.

That West Coast Redwood Corporation, herein-
after referred to as "corporation," was duly cre-

ated, organized and existing under and by virtue of the laws of the State of California.

II.

That DeLancey Lewis and Doris B. Lewis are husband and wife and are hereinafter referred to as "sellers." [29]

III.

That said corporation and said sellers did on April 2, 1946, file herein their petition in reclamation in which said respondents seek to reclaim the property for which an order of sale is sought by the Trustees in Bankruptcy of the above named bankrupt. That reference is hereby made to said petition in reclamation and by such reference said petition, together with the exhibits thereto, is hereby incorporated as fully and to the same extent as though at this point re-copied at length in haec verba and pleaded in legal effect.

IV.

That as alleged in said petition in reclamation your respondents herein are the owners of all of the properties for which an order of sale is herein sought by virtue of the terms of said agreements and are entitled to possession of all of said property by reason of the defaults of the purchasers under said contract as alleged in said petition in reclamation or in lieu of such possession are entitled to full payment of the entire amounts due to them under said contracts together with advances made by them together with interest thereon and attorney's fees as alleged in said petition.

Wherefore, said respondents pray:

1. For an order of restoration to them in accordance with their petition in reclamation heretofore filed herein; or

2. That said bankrupt and said Trustees in Bankruptcy be directed to pay to your respondents the full amounts due to them under said contracts hereinbefore mentioned, together with interest thereon and together with the additional amounts advanced by them as alleged in said petition in reclamation; and

3. That said bankrupt and said Trustees in Bankruptcy be directed to pay to respondents the sum of three thousand five [30] hundred (3500.00) dollars as attorney's fees herein to be fixed as costs in this proceeding; or

4. If an order of sale be made herein that such order be made subject to all of the rights of your respondents as hereinbefore set forth, and alleged in said petition in reclamation heretofore filed herein, to collect the balances due to them together with interest and the advances made by them, and attorney's fees; and

5. That said respondents be granted such other and further relief as may be meet and proper in the premises.

Dated this 5th day of April, 1946.

Attorney for Respondents. [31]

Northern District of California,
City and County of San Francisco.—ss

DeLancey Lewis, being first duly sworn, deposes
and says:

That he is one of the respondents named in the
foregoing answer; that he has read said answer
and knows the contents thereof, and that the same
is true to his own knowledge, excepting as to those
matters therein set forth upon information and
belief, and as to those matters that he believes it
to be true.

DELANCEY LEWIS.

Subscribed and sworn to before me this 5th day
of April, 1946.

DOROTHY H. McLENNAN,

Notary public in and for the City and County
of San Francisco.

Receipt of a copy of the foregoing answer is here-
by admitted this 6th day of April, 1946.

IRVING M. WALKER,

GRAINGER & HUNT,

Attorneys for Trustees.

[Endorsed]: Filed April 15, 1946. Burton J.
Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Cal-
breath, Clerk. [32]

[Title of District Court and Cause.]

RETURN OF SALE OF REAL AND
PERSONAL PROPERTY

Paul W. Sampsell, L. Boteler and Stewart McKee, the trustees in bankruptcy of the estate of the above named corporation, respectfully show:

On November 1, 1945, the above entitled proceeding was commenced in the above entitled court by the above named corporation under Chapter XI of the Bankruptcy Act, as amended, for an arrangement between the said corporation and its creditors. On November 15, 1945, in the same case, the said corporation filed its voluntary petition in bankruptcy. Thereafter and on November 19, 1945, the said corporation was duly adjudicated a bankrupt upon [33] said petition, and further proceedings in the case were referred by the court to Benno M. Brink, a Referee in Bankruptcy thereof. On November 20, 1945, Paul W. Sampsell, J. Ray Files, and Stewart McKee were appointed and qualified by the court as primary receivers in bankruptcy of the estate of the said corporation. Thereafter they acted in that capacity until January 4, 1946. On January 4, 1946, Paul W. Sampsell, L. Boteler, and Stewart McKee were appointed, with the approval of the court, and qualified by the court, as trustees in bankruptcy of the estate of the said corporation, and ever since have been and now are the duly appointed, qualified, and acting trustees in bankruptcy of the said estate. On November 26, 1945, upon the application of the said primary

receivers in bankruptcy, ancillary proceedings in bankruptcy were commenced and thereafter prosecuted in the United States District for the Northern District of California. Thereafter and on November 26, 1945, the said District Court for Northern California appointed and qualified as ancillary receivers in bankruptcy for the Northern District of California, Paul W. Sampsell of Los Angeles and William G. Mikulich of San Francisco. Thereafter the said ancillary receivers in bankruptcy for the Northern District of California continued to act as such until 10:30 a.m. on Monday, February 18, 1946, when their duties as such ancillary receivers in bankruptcy, except to account to said District Court for the Northern District of California for their administration, were terminated, and they were superseded in office by said trustees in bankruptcy.

Among the assets of the bankrupt estate is a sawmill located about ten miles northwest of Willits, Mendocino County, California, comprising real estate, machinery and equipment, timber options, and rolling stock and other loose articles of personal property, purchased partly on contract from DeLancey Lewis and Doris B. Lewis, his wife, West Coast Redwood Corporation, a corporation, [34] and Stevenson Farm Equipment Co., a partnership. The real estate consists of six parcels of land located in said Mendocino County and is described as set forth in "Exhibit A" hereto attached and made a part hereof.

The title of the trustees in bankruptcy to the

sawmill, real and personal property, is equitable. At the time of bankruptcy, the bankrupt corporation was purchasing the said real estate and machinery and equipment of the sawmill on contract from said DeLancey Lewis and Doris B. Lewis, and West Coast Redwood Corporation. Also at the time of bankruptcy, the bankrupt was purchasing certain rolling stock used at the mill on contract from said Stevenson Farm Equipment Co. The said Stevenson Farm Equipment Co., a partnership, also holds an equitable lien on all the property. The Stockton Morris Plan Co., a corporation, held a chattel mortgage on other rolling stock. Parcels 4, 5 and 6 of the real estate were acquired by the bankrupt through tax deeds, and title companies will not insure tax titles.

The above entitled court, acting through Burton J. Wyman, Referee in Bankruptcy, signed, filed and entered herein on May 24, 1946, an order determining the balances due upon such conditional sales contracts, equitable lien, and chattel mortgage, as follows:

1. DeLancey Lewis and Doris B. Lewis, his wife, conditional sales contract on real property, dated February 28, 1942, plus interest upon the sum of \$1,811.61, at the rate of 6% per annum from August 15, 1945, until paid\$3,748.10

2. West Coast Redwood Corporation, a corporation, conditional sales contract on machinery and equipment of sawmill, dated

March 22, 1944, plus interest thereon at the rate of 4% per annum from October 1, 1945, until paid\$27,366.70

3. Theodore Monell, attorney for DeLancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, a corporation, counsel fees in connection with their conditional sales contracts 2,500.00

4. Stevenson Farm Equipment Co., a partnership, conditional sales contracts upon rolling stock, dated October 7, 1944 and April 15, 1945, and equitable lien on all the property 4,274.28

5. Bryce Swartfager, attorney for Stevenson Farm Equipment Co., a partnership, counsel fees in connection with its conditional sales contracts 150.00

6. Stockton Morris Plan Company, a corporation, chattel mortgage lien on rolling stock, dated April 10, 1945 2,373.57

Total\$40,412.65

Industrial Equipment Co. holds a conditional sales contract covering a light plant in which the bankrupt has an equitable interest. The bankrupt contends that there is a balance due of \$89.22 but the industrial Equipment Co. asserts that \$120.22 is the correct balance. The total amount due upon

all these items, including interest to date, amounts to a little less than \$43,000.00.

An inventory of the said personal property except timber options has been filed herein, and a copy thereof is hereto attached as "Exhibit B" and made a part hereof. The original inventory figure was \$90,439.00. But certain third parties claim title to, and right to the possession of, certain articles on that list, adverse to the trustees in bankruptcy. The inventory figure of these articles is \$4,429.50, thus leaving a net figure of \$86,009.50. Such claim of these third parties is not conceded by the trustees in bankruptcy.

The said property, real and personal, has been appraised herein at \$42,000.00.

Pursuant to extensive advertising through circulars sent to prospective bidders throughout California, (a copy of the notice of sale is hereto attached as Exhibit C) bids for the sale of the said real and personal property, free and clear of liens and claims thereon, except current county taxes which are to be prorated as of the date of the escrow [36] hereinafter mentioned, and any lien arising out of county taxes for the fiscal year 1946-1947, and except the following:

Existing roads and rights of way.

Right of Way for pipe line granted to Chas. Underhill by Luella Morrell and Luella Morrell, Guardian of Harriet Adeline Davis, a minor, by

instrument dated Nov. 10, 1922 and recorded same day in Libar 170 of Deeds, page 103, Mendocino County Records, affects Parcel One.

Water right granted by DeLancey Lewis et ux, to Geo. J. Stempel et ux by deed dated Feb. 19, 1943, recorded in Liber 163 of Official Records, page 39, Mendocino County Records. Affects Parcel One.

were received by the trustees before Referee in Bankruptcy Burton J. Wyman in his courtroom on May 20, 1946. After considerable competition, the highest bid made was \$66,600.00, submitted by A. J. Barbee doing business under the trade name of California-Pacific Lumber Co. The trustees have accepted the said bid, as the highest and best bid obtainable and return the same herewith for confirmation. Such a sale will enable the trustees to clear off all liens and claims upon the property and leave an equity for the bankrupt estate of over \$24,000.00.

The sale is to be consummated through an escrow with the Title Insurance and Guaranty Co., of San Francisco. Current taxes are to be prorated as of the date of the escrow. There are some previous unpaid taxes that must be paid out of the escrow by the estate. U. S. revenue stamps, notary and recording fees are to be paid by the estate. [37] The cost of a policy of title insurance is to be borne by the purchases.

\$6660.00, or 10% of the entire amount of the bid,

viz., \$66,600.00, has been deposited with the court of the trustees in bankruptcy. If for any good and sufficient reason it shall appear that it would be equitable to return to the buyer the said purchase price, or any part thereof, by reason of undue delay in completion of the escrow, uncurable defects in title, etc., the buyer may apply to the above-entitled court for relief upon due notice to the trustees in bankruptcy. Upon confirmation of the sale by the court, the purchaser is to be let into possession of the property, but church members upon the property shall have fifteen days thereafter in which to remove themselves and their effects from the premises. In the event, for any good and sufficient reason, the said escrow cannot be closed, or there appears to be uncurable defects in the titles to the properties, and the purchaser shall apply to this court for a rescission of the sale, an equitable financial adjustment, under, the supervision of the court, between the purchaser and the trustees in bankruptcy, shall be made with respect to the use of the premises by the purchaser while he held possession.

During the course of administration herein it is necessary that such property be liquidated by sale; and this sale apparently produces the best price obtainable under existing circumstances.

On May 10, 1946, an order was made by the District Court of the United States, Central Division, Northern District of California, the court

of primary jurisdiction, acting through Benno M. Brink, a referee in bankruptcy thereof, authorizing the said trustees to sell the said real and personal property. [38] The said order was made after due notice given to creditors pursuant to the provisions of Sec. 58 of the Bankruptcy Act. A certified copy of said order is hereto attached and made part hereof as "Exhibit D".

Wherefore, the said trustees pray that the said sale be confirmed as above outlined, and for general relief.

Dated: This 23rd day of May, 1946.

/s/ PAUL W. SAMPSELL,
Trustee.

/s/ L. BOTLER,
Trustee.

/s/ STEWART McKEE,
Trustee.

[Endorsed]: Filed May 25, 1946. Burton J. Wyman, Referee in bankruptcy. [39]

State of California,
County of Los Angeles—ss.

L. Botler, being first duly sworn, deposes and says:

I am one of the trustees named in the foregoing return of sale and make this verification for and on behalf of all of the trustees. I have read the foregoing return of sale and know the contents

thereof, and the same is true to the best of my knowledge, information, and belief.

L. BOTELEK,

Affiant.

Subscribed and sworn to before me this 23rd day of May, 1946.

[Seal]

BESS A. ALDRICH,

Notary Public in and for said
County and State.

[Endorsed]: Filed May 25, 1946. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [40]

[Title of District Court and Cause.]

STIPULATION RE WILLITS SAWMILL

The above entitled court, acting through Burton J. Wyman, a Referee in Bankruptcy thereof, having signed, filed and entered herein on May 27, 1946, its order directing that Paul W. Sampsell, L. Boteler and Stewart McKee, the Trustees in Bankruptcy herein, if they desire to retain as assets of the estate, certain properties, real and personal, referred to in said order, they shall, on or before June 1, 1946, pay to DeLancy Lewis and Doris E. Lewis, his wife, and to Westcoast Redwood Corporation, a corporation, and to Stevenson Farm Equipment Company, a corporation, and to Stockton

Morris Plan Company, a corporation, certain monies specified in the said order; and

Whereas, the said Trustees in Bankruptcy are engaged in endeavoring to sell the said property, real and personal, for a price in excess of the aggregate amount of said monies so to be paid, and also have in view a refinancing offer which contemplates the paying off of the said monies; and

Whereas, in the event of a sale or a refinance, an escrow with [41] a responsible title company will be necessary, and Title Insurance and Guaranty Co., of 130 Montgomery St., San Francisco, is satisfactory for that purpose,

It Is Hereby Stipulated and Agreed that the said time of June 1, 1946, is hereby extended to June 17, 1946, or, if, in the meantime, an escrow is opened with the said title company for the purpose of consummating a sale or a refinancing scheme, which escrow is satisfactory to the parties, then until the completion of such escrow.

It Is Hereby Further Stipulated and Agreed that all parties hereto will cooperate to the end that all necessary documents and papers shall be executed and delivered into such escrow in order that good title to the property shall appear.

The approximate amount of the said monies so to be paid is \$42,000.00

PAUL W. SAMPSELL,

L. BOTELER and

STEWART McKEE,

Trustees in Bankruptcy,

By GRAINGER & HUNT,

By /s/ REUBEN G. HUNT,

Their Attorneys.

/s/ THEODORE M. MONNELL,

Attorney for DeLancey Lewis
and Doris B. Lewis, his
wife, and West Coast Red-
wood Corporation, a corp.

/s/ BRYCE SWARTFAGER,

Attorney for Stevenson Farm
Equipment Co.

/s/ LAFAYETT J. SMALLPAGE,

Attorney for Stockton Morris
Plan Co., a corp.

The foregoing stipulation is hereby approved this 27th day of May, 1946, and it is so ordered.

/s/ BURTON J. WYMAN,

Referee in Bankruptcy.

[Endorsed]: Filed May 27, 1946. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [42]

[Title of District Court and Cause.]

ORDER CLEARING TITLE, DETERMINING
AMOUNTS DUE UNDER LIENS, AND
OF SALE

Paul W. Sampsell, L. Boteler, and Stewart McKee, the Trustees in Bankruptcy of the estate of the above-named corporation, having filed herein their petition for release of attachments and executions, and having later filed herein their petition for an order of sale, with relation to the project of the bankrupt corporation known as the Denton Sawmill, near Willits, Mendocino County, California,

And an order to show cause upon the said petitions having been duly issued herein, and the said petitions and orders to show cause having been duly served upon the respondents named in the said petitions,

And DeLancey Lewis and Doris B. Lewis, and West Coast Redwood Corporation, a corporation, having filed herein answers to the said petition for an order or sale, and Stevenson Farm Equipment Co., a partnership, having filed herein an answer to the said petition for release of attachments and executions, [43]

And DeLancey Lewis and Doris B. Lewis, and West Coast Redwood Corporation, a corporation, having filed herein a petition in reclamation of the real property, and most of the personal property, involved in said sawmill, and the court having there-

upon issued an order to show cause upon said last named petition, directed to the Trustees in Bankruptcy, and the said Trustees in Bankruptcy having thereafter filed herein an answer to the said petition in reclamation,

And the said petitions and answers coming on regularly for hearing before the undersigned Referee in Bankruptcy on March 15 and April 15, 1946, Reuben G. Hunt, of Grainger and Hunt, appearing as counsel for the Trustees in Bankruptcy; Theodore M. Monell appearing as counsel for DeLancey Lewis and Doris B. Lewis, and West Coast Redwood Corporation, a corporation; Bryce Swartfager appearing as counsel for Stevenson Farm Equipment Co.; and William W. Denton appearing in person,

And the Bank of Willits, E. B. Johnson, and the Sheriff of Mendocino County, California, respondents, failing to appear either in person or by attorney, It Is Hereby Ordered that the defaults of the said Bank of Willits, Sheriff of Mendocino County, and E. B. Johnson be and they are hereby entered,

And the issues raised by the said pleadings having been heard before the said Referee and submitted to him for decision,

The said Referee hereby makes the following

FINDINGS OF FACT

I.

On November 1, 1945, the above-entitled proceeding was commenced in the above-entitled court by

the above-named corporation under Chapter XI of the Bankruptcy Act, as amended, for an arrangement between the said corporation and its creditors. On November 15, 1945, in the same case, the said corporation [44] filed its voluntary petition in bankruptcy. Thereafter and on November 19, 1945, the said corporation was duly adjudicated a bankrupt upon said petition, and further proceedings in the case were referred by the court to Benno M. Brink, a Referee in Bankruptcy thereof. On November 20, 1945, Paul W. Sampsell, J. Ray Files, and Stewart McKee were appointed and qualified by the court as primary receivers in bankruptcy of the estate of the said corporation. Thereafter they acted in that capacity until January 4, 1946. On January 4, 1946, Paul W. Sampsell, L. Boteler, and Stewart McKee were appointed, with the approval of the court, and qualified by the court, as Trustees in Bankruptcy of the estate of the said corporation, and ever since have been and now are the duly appointed, qualified, and acting Trustees in Bankruptcy of the said estate.

II.

On November 26, 1945, upon the application of the said primary receivers in bankruptcy, ancillary proceedings in bankruptcy were commenced and thereafter prosecuted in the United States District for the Northern District of California. Thereafter and on November 26, 1945, the said District Court for Northern California appointed and qualified as ancillary receivers in bankruptcy for the Northern District of California, Paul W. Sampsell of Los

Angeles and William C. Mikulich of San Francisco. Thereafter the said ancillary receivers in bankruptcy for the Northern District of California continued to act as such until 10:30 a.m. on Monday, February 18, 1946, when their duties as such ancillary receivers in bankruptcy, except to account to said District Court for the Northern District of California for their administration, were terminated, and they were superseded in office by said Trustees in Bankruptcy.

III.

Among the assets of the bankrupt estate is a sawmill located about ten miles northwest of Willits, California, comprising [45] real estate, the machinery and equipment of the said sawmill, and other personal property, purchased partly on contract from DeLancey Lewis and West Coast Redwood Corporation, a corporation. Ever since July 27, 1945, and up to the time of bankruptcy, the bankrupt corporation operated the said real and personal property as a sawmill through William W. Denton as its agent. On November 1, 1945, when the bankruptcy proceedings were commenced, as aforesaid, the bankrupt corporation was the owner of, and in the actual possession of, the said real and personal property, pursuant to contracts of sale from DeLancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, a corporation. Since the commencement of the bankruptcy proceeding, the said sawmill has been operated under the jurisdiction of the bankruptcy court by the said William W. Denton for the benefit of

the bankrupt estate. The said Stevenson Farm Equipment Co., a partnership, furnished to the said William W. Denton, prior to July 27, 1945, and subsequent thereto, materials and labor of the reasonable value of \$740.96, without actual knowledge of a transfer on July 27, 1945, by the said William W. Denton to the bankrupt corporation of all of his right, title, and interest in and to the real and personal property covered by said sawmill. Such materials and labor were so furnished in sole reliance upon the credit of the said William W. Denton and without any knowledge that the real party-in-interest, after July 27, 1945, was the said bankrupt corporation. The said amount of \$740.96 has never been paid. The said transfer by the said William W. Denton to the bankrupt was made without a fair consideration and while the said William W. Denton was engaged in business and left the said William W. Denton without any capital.

IV.

On April 10, 1945, and prior to July 27, 1945 when the said William W. Denton transferred to the bankrupt corporation all of his right, title, and interest in and to the real and personal property covered by said sawmill, the said William W. [46] Denton, with others, executed and delivered to the Stockton Morris Plan Company of Stockton, California, their promissory note for \$4,346.00. The payment of said note was secured by a chattel mortgage executed and delivered by the said William W. Denton, and others, to the said Stockton Morris Plan Company on or about April 10, 1945,

covering two logging trailers and two logging trucks. The balance due and unpaid upon the said promissory note and chattel mortgage is the sum of \$2,373.57. The bankrupt corporation took over the property covered by the said chattel mortgage subject to the same.

V.

On October 7, 1944, the said Stevenson Farm Equipment Co., a partnership, executed and delivered to the said William W. Denton a conditional sales contract covering a tractor and a bulldozer, and thereupon delivered the said tractor and the said bulldozer to the said William W. Denton, who used the same until July 27, 1945, and thereafter the bankrupt corporation has used and is now using the same. The bankrupt corporation took over the property covered by said conditional sale contract, subject to the same, and subject to the payment of the said sum of \$740.96. On April 15, 1945, the said Stevenson Farm Equipment Co., a partnership, executed and delivered to the said William W. Denton a conditional sale contract covering a Carco winch, and thereupon delivered the said Carco winch to the said William W. Denton, who used the same until July 27, 1945, and thereafter the bankrupt corporation has used and is now using the same. The bankrupt corporation took over the property covered by said conditional sale contract, subject to the same, and subject to the payment of the said sum of \$740.96. The balance due upon the said two conditional sale contracts is the sum of \$3,533.32. The said conditional sale contracts provide for the payment to

counsel for the said Stevenson Farm Equipment Co. of reasonable attorney's [47] fees incurred in the collection of the balances due upon said contracts. Bryce Swartfager, of Santa Rosa, has acted as counsel for the said Stevenson Farm Equipment Co. in connection with the collection of the balances due on the said contracts, and has performed legal services herein for the said Stevenson Farm Equipment Co., the reasonable value of which is \$150.00. Neither said sum of \$3,533.32, or said sum of \$150.00, has been paid.

VI.

On March 22, 1944, West Coast Redwood Corporation, a corporation, as seller, entered into a conditional sales contract with the said William W. Denton and William H. James, as purchasers, covering the said sawmill and the equipment thereof, the purchase price being \$50,000.00. The balance due and unpaid upon such purchase price is the sum of \$27,366.70, together with interest thereon at the rate of 4% per annum from October 1, 1945, until paid. The bankrupt corporation, on July 27, 1945, took over the property covered by the said conditional sales contract subject to the same. On February 28, 1942, DeLancey Lewis and Doris B. Lewis, his wife, executed and delivered to the said William W. Denton and William H. James, a conditional sales contract covering the real property upon which said sawmill is located. The balance due upon the said conditional sales contract is \$3,748.10, together with interest on the sum of \$1,811.61 at the rate of 6% per annum from August 15, 1945,

until paid. The said William H. James no longer has any interest in said contracts, or any of the property covered thereby.

VII.

The said conditional sales contracts, wherein West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis are the sellers, provide that, in the event of any action being brought to enforce any of the terms of the said contracts, the prevailing party in such action shall be entitled to [48] reasonable attorney's fees to be fixed by the court and taxes as part of the costs of suit in such action. Theodore M. Monell has acted as counsel for the said West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis in commencing and prosecuting a proceeding herein for the enforcement of the terms of the said conditional sales contracts and the reclamation of the property covered thereby. The reasonable value of his legal services in connection therewith is the sum of \$2,500.00.

VIII.

Ever since July 27, 1945, the said William W. Denton maintained in the Bank of Willits, at Willits, Mendocino County, California, a bank account in his own name but solely as agent for the bankrupt corporation. Subsequent to the commencement of the bankruptcy proceeding, E. B. Johnson of Ukiah, California, commenced and prosecuted in the Superior Court of Mendocino County, California, an action against the said William W.

Denton, to recover a balance alleged to be due for goods sold and delivered to him. In the said action, the said E. B. Johnson caused to be garnisheed the sum of \$457.14 remaining on hand in the said bank account of William W. Denton at the said Bank of Willits, although the title to the said money was in the bankrupt corporation. Subsequent to the commencement of the bankrupt proceeding, said Stevenson Farm Equipment Co., a partnership, commenced an action in the said Superior Court against the said William W. Denton to recover a balance alleged to be due from him for goods sold and delivered, and in said action garnisheed the said bank account.

IX.

During the course of the administration herein it will be necessary for the trustees in bankruptcy to dispose of the said property by sale or otherwise or provide some method for the satisfaction of such liens if the property is to be retained by the estate. [49]

From the foregoing Findings of Fact, the Referee makes the following:

CONCLUSIONS OF LAW

I.

If the Trustees in Bankruptcy desire to retain possession of, and acquire full title to the said logging trailers and trucks, they must pay the Stockton Morris Plan Company the sum of \$2,373.57.

II.

If the said Trustees in Bankruptcy desire to retain possession of, and acquire full title to the said tractors and bulldozers, they must pay Stevenson Farm Equipment Co., a partnership, the sum of \$3,533.22, upon receiving from it a cancellation of such conditional sales contracts and a bill of sale to the property covered thereby, and to Bryce Swartfager, the attorney for the said partnership, the sum of \$150.00. These payments must be made on or before June 1, 1946, or the said tractors and bulldozers returned to said Stevenson Farm Equipment Co. If said tractors and bulldozers are so returned, the estate must pay said Stevenson Farm Equipment Co. for the use thereof, at the rate of \$315.00 per month from and after April 15, 1946.

III.

If the said Trustees in Bankruptcy desire to retain possession of the land and sawmill equipment involved in the said conditional sales contracts of West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis, and acquire full title thereto, they must pay West Coast Redwood Corporation, a corporation, on or before June 1, 1946, the sum of \$27,366.70, plus interest thereon at the rate of 4% per annum from October 1, 1945, upon receiving a deed to such real property; and they must also pay DeLancey Lewis and Doris B. Lewis, on or [50] before June 1, 1946, the sum of \$3,748.10, plus interest on the sum of \$1,811.61, at the rate of 6% per annum from August 15, 1945,

upon receiving a bill of sale of such personal property; and they must also pay the said Theodore M. Monell, on or before June 1, 1946, the sum of \$2,500.00 as attorney's fees in connection with his legal services herein on behalf of the said West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis.

IV.

If the said Trustees in Bankruptcy desire to retain possession of the land and sawmill equipment involved herein, they should pay to Stevenson Farm Equipment Co., a partnership, the sum of \$740.96.

V.

Bank of Willits, a corporation, has no right, title or interest in, or lien upon, the said sum of \$457.14 now on deposit with it in the name of the said William W. Denton, adverse to the said Trustee in Bankruptcy, and should forthwith pay over the said money to the said Trustees in Bankruptcy.

VI.

The Trustees in Bankruptcy should be authorized to sell such property either subject to or free and clear of liens and claims or free and clear of some liens and claims and subject to others.

VII.

The said garnishments are without legal force or effect.

From the foregoing Findings of Fact and Conclusions of Law It Is Hereby Ordered, that if the

Trustees in Bankruptcy shall retain the respective land, sawmill equipment and rolling stock herein involved, they shall respectively

1. Pay to the Stockton Morris Plan Company, a [51] corporation, the sum of \$2,373.57, upon receiving a release and satisfaction of the said chattel mortgage.

2. Pay to Stevenson Farm Equipment Co., on or before June 1, 1946, the sum of \$3,533.32, upon receiving a cancellation of said conditional sales contracts and a bill of sale covering the personal property included therein, and to Bryce Swartfager the sum of \$150.00, or return to the said Stevenson Farm Equipment Co., a partnership, the tractors and bulldozers above mentioned, together with rent for the use of the same in the meantime at the rate of \$315.00 per month.

3. Pay to West Coast Redwood Corporation, a corporation, on or before June 1, 1946, the sum of \$27,366.70, together with interest thereon at the rate of 4% per annum from October 1, 1945, until paid, upon receiving a bill of sale to the personal property involved in the sawmill, or deliver to said West Coast Redwood Corporation, a corporation, the possession of, and a bill of sale to the personal property covered by the conditional sales contract given by West Coast Redwood Corporation, a corporation, as above mentioned.

4. Pay to DeLancey Lewis and Doris B. Lewis, on or before June 1, 1946, the sum of \$3,748.10, plus interest on the sum of \$1,811.61 at the rate of 6%

per annum from August 15, 1945, until paid, upon receiving a deed to the real property involved in the sawmill, or execute and deliver to the said DeLancey Lewis and Doris B. Lewis, a quit-claim deed to the land covered by the conditional sales contract given by DeLancey Lewis and Doris B. Lewis, as above mentioned, together with improvements thereon.

5. Pay to Theodore M. Monell, on or before June 1, 1946, as attorney's fees for legal services herein on behalf of said West Coast Redwood Corporation, a corporation, and said DeLancey Lewis and Doris B. Lewis, the sum of \$2,500.00, if the said Trustees in Bankruptcy shall, on or before that date, pay off the balances due to said West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis.

6. Pay to Stevenson Farm Equipment Co., a partnership, the sum of \$740.96.

It Is Hereby Further Ordered That:

1. The Bank of Willits of Willits, Mendocino County, California, shall disregard the said garnishments and forthwith pay over to the said Trustees in Bankruptcy the said sum of \$457.14 now on deposit with it in the name of William W. Denton.

2. The said William W. Denton has no right, title or interest in, or lien upon, any or all of the property covered by this Order.

3. The Trustees in Bankruptcy are authorized to sell the said property either free and clear of

liens, or subject thereto, or free and clear of some liens and subject to others, or provide some method for the satisfaction of such liens if the property is retained by the estate.

4. The said payments shall be made by the said Trustees in Bankruptcy on or before June 1, 1946, in default of which the Trustees in Bankruptcy shall abandon the property herein involved as assets burdensome to the estate.

Dated: This 15th day of April, 1946.

BURTON J. WYMAN,
Referee in Bankruptcy. [53]

The foregoing Order is hereby approved this
.....day of April, 1946.

GRAINGER AND HUNT,
By REUBEN G. HUNT,
Attorneys for Trustees in
Bankruptcy.

/s/ LAFAYETTE J. SMALLPAGE,
Attorney for the Stockton
Morris Plan Company,
a Corporation.

/s/ THEODORE M. MONELL,
Attorney for DeLancey Lewis
and Doris B. Lewis, his wife,
and West Coast Redwood Cor-
poration, a corporation.

/s/ BRYCE SWARTFAGER,
Attorney for Stevenson Farm
Equipment Co.

[Endorsed]: Filed May 27, 1946. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [54]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

The petition of Paul W. Sampsell, L. Boteler, and Stewart McKee, the trustees in bankruptcy of the estate of the above-named corporation, respectfully represents:

I.

On November 1, 1945, the above-entitled proceeding was commenced in the above-entitled court by the above-named corporation under Chapter XI of the Bankruptcy Act, as amended, for an arrangement between the said corporation and its creditors. On November 15, 1945, in the same case, the said corporation filed its voluntary petition in bankruptcy. Thereafter and on November 19, 1945, the said corporation was duly adjudicated a bankrupt upon said petition, and further proceedings in the case were referred by the court to Benno M. Brink, a Referee in Bankruptcy thereof. On November 20, 1943, Paul W. Sampsell, J. Ray Files, and Stewart McKee were appointed and qualified [55]

by the court as primary receivers in bankruptcy of the estate of the said corporation. Thereafter they acted in that capacity until January 4, 1946. On January 4, 1946, Paul W. Sampsell, L. Boteler, and Stewart McKee were appointed, with the approval of the court, and qualified by the court, as trustees in bankruptcy of the estate of the said corporation, and ever since have been and now are the duly appointed, qualified, and acting trustees in bankruptcy of the said estate.

II.

On November 26, 1945, upon the application of the said primary receivers in bankruptcy, ancillary proceedings in bankruptcy were commenced and thereafter prosecuted in the United States District for the Northern District of California. Thereafter and on November 26, 1945, the said District Court for Northern California appointed and qualified as ancillary receivers in bankruptcy for the Northern District of California, Paul W. Sampsell of Los Angeles and William C. Mikulich of San Francisco. Thereafter the said ancillary receivers in bankruptcy for the Northern District of California continued to act as such until 10:30 a.m. on Monday, February 18, 1946, when their duties as such ancillary receivers in bankruptcy, except to account to said District Court for the Northern District of California for their administration, were terminated, and they were superseded in office by said trustees in bankruptcy. On November 26, 1945, the above-entitled court referred the said ancillary pro-

ceedings to Burton J. Wyman, a Referee in Bankruptcy thereof, and ever since said 26th day of November, 1945, the administration of the estate in the said ancillary proceedings has been and now is pending before the said Burton J. Wyman, Referee in Bankruptcy.

III.

On May 27, 1946 the said Burton J. Wyman signed, filed, and entered herein his order clearing title, determining [56] amounts due under liens, and of sale, with reference to assets of the bankrupt estate commonly known as the Denton-James Sawmill or the Willits Sawmill, located near Willits, Mendocino County, California. In the said order of May 27, 1946, it is provided that on or before a specified time the trustees in bankruptcy, if they desire to retain the said property as assets of the bankrupt estate, shall pay to West Coast Redwood Corporation, a corporation, the sum of \$27,366.70, together with interest thereon at the rate of 4% per annum from October 1, 1945 until paid, the same arising out of a conditional sales contract upon the land of the sawmill held by said West Coast Redwood Corporation, a corporation. The said order of May 27, 1946, also provides that on or before a specified time, the said trustees in bankruptcy, if they desire to retain the said sawmill as an asset of the bankrupt estate, shall pay to DeLancey Lewis and Doris B. Lewis the sum of \$3,748.10, plus interest on the sum of \$1,811.61 at the rate of 6% per annum from August 15, 1945, until paid, the same arising by reason of a conditional sales con-

tract held by the said DeLancey Lewis and Doris B. Lewis upon the machinery and equipment of the said sawmill.

IV.

Each of the said conditional sales contracts contains the following provisions:

“In the event of any action or proceeding being brought by either party hereto to enforce any of the terms hereof, it is further agreed that the prevailing party in such action or proceeding shall be entitled to reasonable attorney’s fees, which shall be fixed by the court and taxed as costs of suit in such action or proceeding.”

In the said order of May 27, 1946, the said Referee allowed Theodore Monell, as attorney for said West Coast Redwood Corporation, a corporation, and said DeLancey Lewis and Doris B. Lewis the sum of \$2,500.00 for his services herein in connection with said conditional sales contracts. [57]

V.

The said portion of the said order clearing title, determining amounts due under liens, and of sale, wherein there was allowed to the said Theodore Monell the said sum of \$2,500.00 for legal services, is erroneous for the following reasons: The amount allowed is excessive and an abuse of discretion on the part of the Referee. The record in this case discloses that, at the time of the making of the said order, only the following services had been performed by the said Theodore Monell as such attorney for his said clients:

1. Prepared, served, and filed a simple answer to the trustees' petition for an order of sale herein. There was not any contest in that proceeding, the order of sale being made by consent.

2. Prepared, and caused to be served and filed, a petition in reclamation, and prepared and caused to be signed and issued by the Referee an order to show cause against the trustees in bankruptcy. There was not any controversy over this petition. The amounts claimed to be due the West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis were conceded by the trustees in bankruptcy. The only question in issue was the amount to be allowed Theodore Monell for his legal services.

3. Theodore Monell held conferences with various persons, including his own clients and counsel for the trustees in bankruptcy, in regard to these matters.

Under these circumstances it was error and an abuse of discretion of the Referee to award to Theodore Monell for such services any sum in excess of \$500.00.

Wherefore, petitioners pray for a review by the Judge of that portion of the said Referee's order of May 27, 1946, wherein an allowance was made to the said Theodore Monell of the said sum of \$2,500.00, and that said order be modified to the extent that the allowance be fixed at a sum not to exceed the sum of \$500.00. [58]

Dated: This 29th day of May, 1946.

/s/ PAUL W. SAMPSELL,

/s/ L. BOTELER,

/s/ STEWART McKEE,

Petitioners.

IRVING M. WALKER,

GRAINGER AND HUNT,

By REUBEN G. HUNT,

Attorneys for Petitioners.

State of California,

County of Los Angeles—ss.

Paul W. Sampsell, being first duly sworn, deposes and says:

I am one of the trustees named in the foregoing petition and make this verification for and on behalf of all of the trustees. I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information, and belief.

PAUL W. SAMPSELL,

Affiant.

Subscribed and Sworn' to Before me this 29th day of May, 1946.

[Seal] /s/ ESTHER ANDERSON,
Notary Public in and for said County and State.

[Endorsed]: Filed June 5, 1946. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [60]

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
ON TRUSTEES' PETITION FOR REVIEW
OF PORTION OF ORDER, DATED APRIL
15, 1946, CLEARING TITLE, DETERMIN-
ING AMOUNTS DUE UNDER LIENS, AND
OF SALE

To Honorable Michael J. Roche, United States Dis-
trict Judge for the Northern District of Cali-
fornia:

I, Burton J. Wyman, one of the referees in bank-
ruptcy of this court and the referee in charge of
this proceeding, respectfully certify and report
that:

On March 29, 1946, Paul W. Sampsell, L. Boteler
and Stewart McKee, the trustees of the estate of
the above named bankrupt then, and now, pending
in the United States District Court for the South-
ern District of California, filed herein, through their
attorneys, Irving M. Walker, Esq., and Messrs.
Grainger and Hunt, a petition for the sale of certain
real and personal properties known as the "Denton
Sawmill", situated in Mendocino County, Califor-
nia. Among the [61] allegations, in substance, con-
tained in said petition were, and are:

That contained in the assets of the bankrupt is
a sawmill located about ten miles northeast of
Willits, California, comprising real estate, the ma-
chinery and equipment of said sawmill, and other
personal property, purchased partly on contract

from DeLancey Lewis and West Coast Redwood Corporation; that ever since July 27, 1945, and up to the time of the bankruptcy, the bankrupt corporation operated said real and personal properties as a sawmill, through William W. Denton, as trustee; that on November 1, 1945, when the original bankrupt was commenced in the United States District Court for the Southern District of California, as aforesaid, the bankrupt corporation was the owner, and in the actual possession of, said real and personal properties, pursuant to contracts of sale from DeLancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Lumber Corporation; that since the commencement of said original bankruptcy proceedings, as aforesaid, said sawmill has been operated under the jurisdiction of the bankruptcy court by said William W. Denton for the benefit of the bankrupt estate.

That the interest of the bankrupt estate in said real and personal properties has been appraised at approximately \$42,000.00; that the balance due on said contracts of sale is a little less than \$30,000.00; that in order to realize this apparent equity in said properties it is necessary for the trustees in bankruptcy to sell said properties pursuant to the requirements of Section 47a(1) of the Bankruptcy Act.

That said DeLancey Lewis, Doris B. Lewis, West Coast Redwood Corporation and William W. Denton, claim some right, title, or interest in, or lien upon, the said properties, or some part thereof,

adverse to said trustees in bankruptcy, with respect to the equity in said properties, but that any such claim, or claims, are without right, or foundation, and are subordinate to the claims of said trustees in bankruptcy. [62]

The aforesaid petition concluded, and concludes, in substance, with the prayer:

(1) That an order issue directing said DeLancey Lewis, Doris B. Lewis, West Coast Redwood Corporation and William W. Denton, to appear before the above named District Court for the Northern District of California, to show cause why said properties should not be sold free and clear of liens and claims thereon, or subject to liens and claims; (2) that upon the hearing of said order to show cause, an order be made herein, in conformity therewith; (3) that the trustees in bankruptcy be awarded the costs of this proceeding, and (4) that the trustees in bankruptcy have general relief.

Pursuant to the prayer of said petition, and in compliance therewith, said DeLancey Lewis, Doris B. Lewis, West Coast Redwood Corporation, and William W. Denton, on March 30, 1946, were ordered to appear before the undersigned referee, at his courtroom in the Grant Building, Seventh and Market Streets, San Francisco, California, on April 15, 1946, at 10 a.m., then and there to show cause, why said petition should not be granted and that any of said respondents desiring to plead, answer, or respond to said order to show cause, should serve and file such pleading, answer, or response, at least five days prior to the date of the hearing.

On April 2, 1946, West Coast Redwood Corporation, DeLancey Lewis and Doris B. Lewis, through Theodore M. Monell, Esq., their attorney, filed their petition in reclamation, in which, among other things, it was, and is, averred, in substance:

That said corporation at all times mentioned in said petition for sale was the owner of said sawmill and equipment; that on or about March 22, 1944, said corporation, as seller, entered into a written agreement with William W. Denton and William H. James, as purchasers, for the sale and purchase of said sawmill and equipment for the total sum of \$50,000.00; that by inadvertence said agreement excluded a provision therefrom which was understood and agreed between the parties thereto providing for the payment of the [63] balance of the purchase price of \$50,000.00 not later than October 1, 1945, and that on, or about, April 6, 1944, said corporation executed an addendum to said agreement which was deposited with the Title Insurance and Guaranty Company in San Francisco, with said original agreement, on March 22, 1944, it being understood that the terms of said addendum were binding upon both parties to said agreement; that said corporation is informed and believes that said addendum was in fact executed by said purchasers, and was accepted by them and that said addendum of April 6 and said agreement of March 22 constitute the agreement between the parties; that said agreement,¹ as so modified by said addendum was assigned by said purchasers to

¹See copies of said agreement and addendum, attached hereto as "Exhibit A".

Christ's Church of the Golden Rule, the above named bankrupt.

That said purchasers violated said agreement, and defaulted in the terms thereof, in that said purchasers failed to acquire from Union Lumber Company, as provided by Paragraph 12² of said agreement, the parcels of timber land under option, and allowed said option to expire, thereby materially damaging said corporation and the future operations of said mill; that said purchasers failed to make the payments in accordance with said agreement and the entire balance thereon, amounting to \$27,366.70, together with interest thereon, at the rate of 4% per annum from October 1, 1945, is due, [64] owing and unpaid; that due demand and notice of said default were given to said purchasers and said default has lasted for a period in excess of thirty days after said demand and notice.

That in, and by, the terms and provisions of said

²The above mentioned paragraph 12 reads:

"The undersigned (William W. Denton and William H. James) further agree to acquire from Union Lumber Company, in accordance with the terms of said outstanding option, the property therein specified, provided that said West Coast shall obtain an extension of sixty (60) days for the exercise of the option as to the next additional parcel to be obtained thereunder, in order to have available timber land for the supply of timber to said mill. All properties obtained under such option by the undersigned shall be immediately assigned and transferred to West Coast, so that West Coast may in turn subject the same to the lien of the encumbrance held by said RFC pending final consummation of this agreement, at which time such property shall be transferred to the undersigned."

agreement, and said purchasers did agree that in the event of any action being brought to enforce any of the terms of said agreement by either party, the prevailing party in such action should be entitled to reasonable attorney's fees to be fixed by the court and taxed as part of the costs of suit in such action; that said corporation alleges that a reasonable sum be allowed as attorney's fees herein in the sum of \$3,000.00.

That by the terms of said agreement, the Lewis contract³ later referred to in said petition for reclamation, should be assigned to said corporation as a part of the consideration for the execution of said contract so that, in the event of any default of the purchasers under the Lewis contract, said corporation could protect its rights by paying the balance due to said DeLancey Lewis and wife, and acquire the property covered by said Lewis contract; that said purchasers assigned their interests under said contract aforesaid to said Christ's Church of the Golden Rule, the bankrupt herein, after the defaults hereinbefore mentioned occurred, and said bankrupt took said contracts subject to said defaulted condition thereof and with knowledge of all of the foregoing matters in said petition in reclamation alleged.

That said agreements specifically provided that the purchaser should have no title to any of the property covered by said agreement until the full amount of the purchase price and the interest

³See copy of said agreement, attached hereto as "Exhibit B".

should have been paid; that title was reserved in, and retained by, said corporation until full payment of said purchase price; that all payments made by said purchasers were, according to [65] the terms of said agreements deemed to have been made by them as rental for said property in the event of any default thereunder; that demand has heretofore been made on said bankrupt and the trustees for said bankrupt for the payment of the balance due under said contract, or the return of said property, but they have refused, and do now refuse, to pay said balance, or return said property.

That at all times herein mentioned, said DeLancey Lewis and Doris B. Lewis (in said petition for reclamation thereafter referred to as "Sellers") were the owners of certain parcels of land described in said contract (herein referred to as "Exhibit B") executed by said DeLancey Lewis and Doris B. Lewis, as first parties and sellers, and William W. Denton and William H. James, as second parties; that in, and by, the terms of said agreement, said DeLancey Lewis and Doris B. Lewis did agree to sell said property to said second parties named in said agreement for the sum of \$4,360.00, payable as therein provided⁴; that said second parties de-

⁴\$500.00 upon the execution of said agreement, on February 28, 1944, the balance in seventeen (17) equal monthly installments of \$227.06, or more, plus interest on unpaid principal at the rate of 6% per annum, principal and interest payable in lawful money of the United States, the first day of each and every month, commencing April 1, 1944, until the full purchase price was paid."

faulted in making the payments due under said contract and there is now due, owing and unpaid from said second parties to DeLancey Lewis and his said wife, under said contract, and in accordance with the terms thereof, the sum of \$1811.61, plus interest at the rate of 6% per annum from August 15, 1945.

That said contract further provided that said second parties should keep all the property insured for the benefit of the respective parties in insurance companies satisfactory to the sellers named therein; that said second parties failed to keep and [66] maintain such insurance and said DeLancey Lewis and his said wife, sellers, have been compelled to pay insurance premiums in the sum of \$1807.61, being necessary and reasonable insurance on said property, and also have been forced to pay taxes on said property in the sum of \$128.88 which said second parties did agree to pay and which they failed to pay.

That in, and by, the provisions of said agreement, it was specifically provided that the title to said property was to remain in, and be retained and reserved in sellers, until full payment of said purchase price, and all sums due under said contract, and all additions and improvements to said property, by second parties, immediately should become, and be, the property of said sellers; that demand heretofore has been made on said bankrupt and its trustees for the payment of the balance due under said contract, or the return of said prop-

erty, but they have refused, and now refuse, to pay said balance, or return said property.

That it further is provided by said contract that in the event of any action, or proceeding, being brought by either party to enforce any of the terms thereof, the prevailing party, in such action, should be entitled to reasonable attorney's fees to be fixed by the court and taxed as costs of suit in such action, or proceeding.

That said petitioners allege that the sum of \$500.00 is a reasonable amount to be allowed as attorney's fees herein.

The aforesaid petition in reclamation ends with a prayer (1) that an order be made restoring to West Coast Redwood Corporation full and complete title of property covered by said contract aforesaid, together with all additions thereto and improvements thereof, (2) for a decree by the Bankruptcy Court that said bankrupt has no interest, or estate, or claim, therein, or thereto, or any part thereof, or (3) that said bankrupt pay to said petitioners the full amount due under said contract, together with interest thereon, as in said petition for reclamation alleged, and (4) for a further order [67] restoring to DeLancey Lewis and his said wife, full and complete title to the property referred to in said real estate contract, aforesaid, together with all improvements and additions thereto, (5) that said bankrupt be directed to pay to the latter named petitioners, said sum of \$1811.61, plus interest at 6% from August 15, 1945,

together with the sum of \$1,807.61, covering said expenditures, (6) that said bankrupt further be directed to pay the sum of \$3,500.00 as attorney's fees herein to be fixed as costs in this proceeding, and (7) for such other and further relief as may be meet and proper in the premises.

On April 4, 1946, an order was issued that Paul W. Sampsell, L. Boteler and Stewart McKee, trustees in bankruptcy of the above named bankrupt, appear before the undersigned referee in bankruptcy, at his courtroom in the Grant Building, Seventh and Market Streets, in San Francisco, California, on April 15, 1946, at the hour of 10 a. m., of said day, to show cause why the petition in reclamation should not be granted.

On April 9, 1946, said trustees filed their answer to said petition in reclamation, therein denying all allegations in said petition contained, the verification of said answer having been waived by Theodore M. Monell, Esq., said attorney for said petitioners in reclamation.

On April 15, 1946, said West Coast Redwood Corporation, DeLancey Lewis and his said wife filed their answer to the trustees' said petition for order of sale of said "Denton Sawmill", said last mentioned answer, for the most part being a repetition of the allegations set forth in said petition for reclamation, which said allegations were incorporated in said answer by specific reference thereto.

During the hearing held on April 15, 1946, as is shown by the Reporter's Transcript of said

hearing, pages 49 to 54, thereof, the following occurred: [68]

“Mr. Monell: I have filed this morning the Answer of the West Coast Redwood Corporation and DeLancey Lewis and his wife, to the petition and order to show cause which was in response to our petition in reclamation, as a defense to the petition and order to show cause in this matter.

“The Referee: Where are you going to get on this, Mr. Hunt?

“Mr. Hunt: Well, we have had several propositions offered to us. We have a few parties interested who were to appear in Court this morning. What I would like to do is to have a similar arrangement made as the one we made with the Stevenson Farm Equipment Company, to give us a certain period either to pay the balance due, or return the property to them.

“The Referee: Is that satisfactory?

“Mr. Monell: The only thing is this mill is extremely valuable and this is the vital time for it. In other words, if we get it back we want to be in operation by May. If they operate it, they should be able to pay the balance without difficulty. I take the position Mr. Swartfarger took. I don't want to hamper these people; on the other hand, we have some stockholders who are concerned.

“The Referee: Suppose I allow the same three months for you.

“Mr. Monell: I would think that would be too much time. If they are going to be able to finance

it at all, they should be able to do it, I would say, within forty days.

“Mr. Hunt: How about sixty?

“Mr. Monell: I think that should be time enough.

“Mr. Hunt: That is a short time.

“The Referee: How about fifty days?

“Mr. Hunt: Give us sixty days.

“The Referee: How about fifty days?

“Mr. Monell: That is the trouble. From June we can only [69] operate until about October. Is that right, Mr. Denton?

“Mr. Denton: Year before last we operated until the middle of November.

“Mr. Monell: If we were sure of being paid out, that would be all right. I think it should be easily disposed of, because people are howling to get their lumber. There was a man here this morning on a proposition of advancing all the money for the claims. He was willing to do so and operate so they would have all the output of the mill.

“Mr. Hunt: We meant to have that particular matter before the Court. Is he here?

“Mr. Monell: He left. He had an appointment with Mr. Roche at 11:30. He said he would come this afternoon if you wanted him.

“Mr. Hunt: We can get him back at 2:00 o'clock.

“Mr. Monell: I cannot come back.

“Mr. Hunt: You don't have to come back. We are not in disagreement about the amount.

“Mr. Monell: Now, you have agreed about the amount.

One thing Mr. Denton testified was that no other documents than the bill of sale had been signed. I have a copy of an assignment given me by the title company. Do you know whether or not that assignment was executed?

“Mr. Denton: That was only in regard to the tractor.

“Mr. Hunt: Mr. Denton is referring to the bill of sale. This is another transaction.

“Mr. Monell: The bill of sale was with reference to one piece of property. I don't know whether the assignment was actually executed by the parties in interest or not. This copy was given me by the title company. They were not sure either. Do you know?

“Mr. Denton: This is not signed, no. [70]

“Mr. Hunt: Did you sign it?

“Mr. Denton: I don't think so, no.

“The Referee: I can appreciate, Mr. Hunt, the position they are in on lumber mills.

“Mr. Hunt: Yes, I know. Well, what is Your Honor's suggestion?

“The Referee: Suppose you agree on forty days.

“Mr. Hunt: That would be before the end of May. Make it the first of June; give us a break.

“Mr. Monell: That is satisfactory.

“Mr. M. Dufton: The summer will be over.

“Mr. Monell: The only thing is, if we don't agree on the first of June, it can be tied up in court easily beyond that. It would be more simple to

agree on the first of June and hope it will be liquidated at that time.

“Mr. Hunt: Well, I said the first of June. That is a Saturday. Monday would be the 3rd.

“The Referee: Mr. Hunt, we will stick to the first of June. Counsel is agreeing now.

“Mr. Hunt: That is all right, but probably we would want a hearing on the matter on the 3rd.

“Mr. Monell: That is all right. Let's hope the matter will be determined before that time.

“Mr. Hunt: We hope to do it before that. Are you people willing to make an offer to buy the place?

“Mr. Monell: We don't know what is pending. There might be at that time.

“Mr. Hunt: What do you mean, you don't know what is pending?

“Mr. Monell: What other offers are made.

“Mr. Hunt: We have not received any offers yet. If you want to make an offer, the Court will consider it, naturally. You don't have to do that now, of course.

“The Referee: Now, if we fix it at the 1st of June, can't [71] you and Counsel negotiate as to the amount between now and then?

“Mr. Hunt: Yes.

“Mr. Monell: The order will be entered that either the entire balance due under both contracts be paid by June 1st, or possession surrendered and some reasonable amount of rental for that period of time be paid.

“The Referee: Can you agree on the rental right now?

“Mr. Hunt: Of course, there would not be any rental on the real estate.

“Mr. Monell: Well, the interest probably would be sufficient so far as the real estate is concerned. And the other, I don’t know what a reasonable rental for a family would be.

“Mr. Hunt: I am not so sure about agreeing to a thing like that, Your Honor. The property they will take over is worth approximately twice—it has been appraised at \$42,000.00.

“The Referee: I know, Mr. Hunt, but if they have rights there——

“Mr. Hunt: But there should not be a large rental on that when they are going to take it back June 1st and realize a large amount of what their contracts call for. There is another equitable contract.

“Mr. Monell: I think there is some merit to Mr. Hunt’s statement. I had not thought about the idea that he made here that we will get more than the principal amount plus the interest due by June 1st.

“Mr. Hunt: That is all right.

“Mr. Monell: Then your Honor should fix attorneys fees also in the matter.

“The Referee: How much are you asking?

“Mr. Monell: \$3,500, a little over 10% of the amount involved.

“The Referee: What do you think [72]

“Mr. Hunt: I don’t like to oppose attorneys

fees generally, Your Honor. I believe had he gone through a long litigation that would be all right. Apparently there has been little litigation.

“Mr. Monell: There have been numerous discussions, and the responsibility, of course, of taking a matter involving this amount. I am perfectly willing to let the Court fix it.

“The Referee: \$2,500.

“Mr. Monell: That is satisfactory, Your Honor.

“Now, as I understand, the order will read that on or before June 1st, both these properties will be returned or the entire amount, plus interest at the contract rates, the West Coast Redwood Corporation's being 4%, and the Lewis being 6%, plus \$2,500 attorneys fees, to be paid on or before June 1st.

“The Referee: Submit your order to Mr. Hunt.

“Mr. Monell: Yes.”

Thereafter, on May 27, 1946, the order clearing title, determining amounts due under liens, and of sale, which had been prepared, and was submitted, by Reuben G. Hunt, Esq., one of the attorneys for said trustees, and which said order was “Dated: This 15th day of April, 1946,” was filed herein. Among the findings of fact set forth in the last mentioned document was, and is, the following found on pages 6 and 7 of said order, being numbered “VII”:

“The said conditional sales contracts, wherein West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis are the sellers, provide that, in the event of any action be-

ing brought to enforce any of the terms of the said contracts, the prevailing party in such action shall be entitled to reasonable attorney's fees to be fixed by the court and taxes as part of the costs of suit in such action. Theodore M. Monell has acted as counsel for the said West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis in commencing [73] and prosecuting a proceeding herein for the enforcement of the terms of the said conditional sales contracts and the reclamation of the property covered thereby. The reasonable value of his legal services in connection therewith is the sum of \$2,500.00."

On pages 8 and 9 of the aforesaid order, in paragraph "III" thereof, and as a part of the "Conclusions of Law", the following appears:

"If the said Trustees in Bankruptcy desire to retain possession of the land and sawmill equipment involved in the said conditional sales contracts of West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis, and acquire full title thereto, they must pay West Coast Redwood Corporation, a corporation, on or before June 1, 1946, the sum of \$27,366.70, plus interest thereon at the rate of 4% per annum from October 1, 1945, upon receiving a deed to such real property; and they must also pay DeLancey Lewis and Doris B. Lewis, on or before June 1, 1946, the sum of \$3,748.10, plus interest on the sum of \$1,811.61, at the rate of 6% per annum from August 15, 1945, upon receiving a bill of sale of such personal prop-

erty; and they must also pay the said Theodore M. Monell, on or before June 1, 1946, the sum of \$2,500.00 as attorney's fees in connection with his legal services herein on behalf of the said West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis."

In the order proper, pages 10 and 11 thereof, paragraph 5 reads: [74]

"Pay to Theodore M. Monell, on or before June 1, 1946,⁵ as attorney's fees for legal services herein

⁵On May 27, there was filed herein a "Stipulation Re: Willits Sawmill", which, among other things in part, reads:

"It is hereby stipulated and agreed that the said time of June 1, 1946, is hereby extended to June 17, 1946, or, if, in the meantime, an escrow is opened with the said title company for the purpose of consummating a sale or a refinancing scheme, which escrow is satisfactory to the parties, then until the completion of such escrow.

"It is hereby further stipulated and agreed that all parties hereto will cooperate to the end that all necessary documents and papers shall be executed and delivered into such escrow in order that good title to the property shall appear.

"The approximate amount of the said monies so to be paid is \$42,000.00.

"PAUL W. SAMPSELL,

"L. BOTELE and

"STEWART McKEE,

"Trustees in Bankruptcy,

"by GRAINGER & HUNT,

"by REUBEN G. HUNT,

"their attorneys.

"THEODORE M. MONELL,

"Attorney for DeLancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, a corporation."

on behalf of said West Coast Redwood Corporation, a corporation, and said DeLancey Lewis and Doris B. Lewis, the sum of \$2,500.00, if the said Trustees in Bankruptcy shall, on or before that date, pay off the balances due to said West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis.”

Attached to the aforesaid Order Clearing Title, Determining Amounts Due Under Liens, and of Sale, aforesaid, is the following:

“The foregoing Order is hereby approved this
..... day of April, 1946.

“GRAINGER AND HUNT,

“By REUBEN G. HUNT,

“Attorneys for Trustees in
Bankruptcy.

“THEODORE M. MONELL,

“Attorney for DeLancey
Lewis and Doris B. Lewis,
his wife, and West Coast
Redwood Corporation, a
corporation.” [75]

On June 5, 1946, the following petition for review was filed with the undersigned referee:

“The petition of Paul W. Sampsell, L. Boteler, and Stewart McKee, the trustees in bankruptcy of the estate of the above-named corporation, respectfully represents:

“I.

“On November 1, 1945, the above-entitled pro-

ceeding was commenced in the above-entitled court by the above-named corporation under Chapter XI of the Bankruptcy Act, as amended, for an arrangement between the said corporation and its creditors. On November 15, 1945, in the same case, the said corporation filed its voluntary petition in bankruptcy. Thereafter and on November 19, 1945, the said corporation was duly adjudicated a bankrupt upon said petition, and further proceedings in the case were referred by the court to Benno M. Brink, a Referee in Bankruptcy thereof. On November 20, 1945, Paul W. Sampsell, J. Ray Files, and Stewart McKee were appointed and qualified by the court as primary receivers in bankruptcy of the estate of the said corporation. Thereafter they acted in that capacity until January 4, 1946. On January 4, 1946, Paul W. Sampsell, L. Boteler, and Stewart McKee were appointed, with the approval of the court, and qualified by the court, as trustees in bankruptcy of the estate of the said corporation, and ever since have been and now are the duly appointed, qualified, and acting trustees in bankruptcy of the said estate.

“II.

“On November 26, 1945, upon the application of the said primary receivers in bankruptcy, ancillary proceedings in bankruptcy were commenced and thereafter prosecuted in the United States District Court for the Northern District of California. Thereafter and on November 26, 1945, the said District Court for Northern California appointed and

qualified as ancillary receivers in bankruptcy for the Northern District of California, Paul W. [76] Sampsell of Los Angeles and William C. Mikulich of San Francisco. Thereafter the said ancillary receivers in bankruptcy for the Northern District of California continued to act as such until 10:30 a. m. on Monday, February 18, 1946, when their duties as such ancillary receivers in bankruptcy, except to account to said District Court for the Northern District of California for their administration, were terminated, and they were superseded in office by said trustees in bankruptcy. On November 26, 1945, the above-entitled court referred the said ancillary proceedings to Burton J. Wyman, a Referee in Bankruptcy thereof, and ever since said 26th day of November, 1945, the administration of the estate in the said ancillary proceedings has been and now is pending before the said Burton J. Wyman, Referee in Bankruptcy.

“III.

“On May 27, 1946, the said Burton J. Wyman signed, filed, and entered herein his order clearing title, determining amounts due under liens, and of sale, with reference to assets of the bankrupt estate commonly known as the Denton-James Sawmill or the Willits Sawmill, located near Willits, Mendocino County, California. In the said order of May 27, 1946, it is provided that on or before a specified time the trustees in bankruptcy, if they desire to retain the said property as assets of the bankrupt estate, shall pay to West Coast Redwood Corpora-

tion, a corporation, the sum of \$27,366.70, together with interest thereon at the rate of 4% per annum from October 1, 1945, until paid, the same arising out of a conditional sales contract upon the land of the sawmill held by said West Coast Redwood Corporation, a corporation. The said order of May 27, 1946, also provides that on or before a specified time, the said trustees in bankruptcy, if they desire to retain the said sawmill as an asset of the bankrupt estate, shall pay to DeLancey Lewis and [77] Doris B. Lewis the sum of \$3,748.10, plus interest on the sum of \$1,811.61 at the rate of 6% per annum from August 15, 1945, until paid, the same arising by reason of a conditional sales contract held by the said DeLancey Lewis and Doris B. Lewis upon the machinery and equipment of the said sawmill.

“IV.

“Each of the said conditional sales contracts contains the following provisions:

“ ‘In the event of any action or proceeding being brought by either party hereto to enforce any of the terms hereof, it is further agreed that the prevailing party in such action or proceeding shall be entitled to reasonable attorney’s fees, which shall be fixed by the court and taxed as costs of suit in such action or proceeding.’

In the said order of May 27, 1946, the said Referee allowed Theodore Monell, as attorney for said West Coast Redwood Corporation, a corporation, and said DeLancey Lewis and Doris B. Lewis the sum

of \$2,500.00 for his services herein in connection with said conditional sales contracts.

“V.

“The said portion of the said order clearing title, determining amounts due under liens, and of sale, wherein there was allowed to the said Theodore Monell the said sum of \$2,500.00 for legal services, is erroneous for the following reasons: The amount allowed is excessive and an abuse of discretion on the part of the Referee. The record in this case discloses that, at the time of the making of the said order, only the following services had been performed by the said Theodore Monell as such attorney for his said clients:

“1. Prepared, served, and filed a simple answer to the trustees’ petition for an order of sale herein. There was not any contest in that proceeding, the order of sale being made by consent.

“2. Prepared, and caused to be served and filed, a petition in reclamation, and prepared and caused to be signed and issued by the Referee [78] an order to show cause against the trustees in bankruptcy. There was not any controversy over this petition. The amounts claimed to be due the West Coast Redwood Corporation, a corporation, and DeLancey Lewis and Doris B. Lewis were conceded by the trustees in bankruptcy. The only question in issue was the amount to be allowed Theodore Monell for his legal services.

“3. Theodore Monell held conferences with

various persons, including his own clients and counsel for the trustees in bankruptcy, in regard to these matters.

Under these circumstances it was error and an abuse of discretion of the Referee to award to Theodore Monell for such services any sum in excess of \$500.00.

“Wherefore, petitioners pray for a review by the Judge of that portion of the said Referee’s order of May 27, 1946, wherein an allowance was made to the said Theodore Monell of the said sum of \$2,500.00, and that said order be modified to the extent that the allowance be fixed at a sum not to exceed the sum of \$500.00.

“Dated: This 29th day of May, 1946.

“/s/ PAUL W. SAMPSELL,

“/s/ L. BOTELER,

“/s/ STEWART McKEE,

“Petitioners.

IRVING M. WALKER,

GRAINGER AND HUNT,

“By REUBEN G. HUNT,

Attorneys for Petitioners.”

(Verification omitted for sake of brevity.) [79]

DISCUSSION BY, AND OPINION OF, REFEREE

While it seldom is possible for a court to measure the value of an attorney’s services with any degree of mathematical certainty, I never, of late years, have been called upon to evaluate such services that

I did not recall the opinion of Woolsey, District Judge, in *re Osofsky* (D.C., N.Y.) 50 F. (2d) 925, wherein, at page 927, the learned judge declared:

“The elements to be considered in determining an attorney’s fee were once most aptly summarized in evidence given on a reference by Honorable William G. Choate, formerly a judge of this court, and David B. Ogden, Esq., a well-known lawyer of a generation ago.

“They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand, but are to be fixed: (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.

“Each case, of course, differs to some extent from every other case in respect of the importance of these several elements.

“In some cases the time element is dominant; in others the skill used seems specially to stand out; and in others still, the amount which a defendant has been saved, or which a plaintiff has

recovered, may be the dominating consideration in the charge. But if all these elements are considered together, and the relative importance of each element is fairly weighed by an attorney, it is possible to arrive at a proper charge in almost any case without much [80] difficulty."

However, in the case here under consideration, I quickly came to the conclusion that some of the yard-sticks suggested for use in the Osofsky and other similar proceedings could be of little, if any, aid to me, because of the peculiar sets of facts and circumstances involved, inasmuch as the interested attorney was not before the court representing a trustee in bankruptcy, a bankrupt, or any creditor there of, but that his position before the court was that of a legal representative of sellers under conditional contracts of sale,¹ in connection with which sales the purchasers were in absolute default and their assignee, the bankrupt herein, at the time of bankruptcy, was without legal rights, in connection with the properties in controversy.

"Under the law of California," said the United States District Court for the Northern District of California, *In re Ideal Laundry Inc.*, 10 F. Supp. 719, 720, "conditional contracts of sale are valid. They are recognized to the fullest extent, and the Supreme Court has announced that 'even bona fide

¹"... in ... California the relationship between the buyer and seller under a conditional sales contract is not that of debtor and creditor." *Fageol Truck & Coach Co. v. Pacific Indemnity Co.* (S. Ct., Calif.) 117 P. (2d) 661, 668, 18 C. (2d) 731, 745.

purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property.' See *Van Allen v. Francis*, 123 Cal. 474, at page 477, 56 P. 339, 340.

"It follows, therefore, that the property in question is that of petitioner; it remains the owner, and as such it cannot without its consent be deprived of the property. It is not a creditor, but it is, under the law of California, the absolute owner of the property under the express reservation of title. Consequently, the provisions of the Bankruptcy Act applicable to creditors are not pertinent, but the rights of petitioner are to be determined by the principles of law governing the rights of owners of property. The [81] court cannot, therefore, deal with the petitioner's property in such manner as to deprive it of the same, and there must be an order granting the petition and permitting petitioner to reclaim its property."

In the proceeding under examination, the petitioners, by and through, the attorney whose allowance now is under attack, has filed their petition in reclamation, but through said attorney, however, and as the result of his advice and good judgment, said petitioners, from the very beginning of the litigation, has shown a disposition to cooperate with the trustees in their efforts to create assets out of reclaimable properties where, in law, no such assets, up to the time of such co-operation, existed. Thus it was that, in fixing the amount of fees, as I did, I

took into consideration that if the attorney for the reclamation petitioners had advised his clients to "sit tight", as he well might have done upon the authority of the Ideal Laundry case, and to rest entirely on their legal rights under California law, by which their rights necessarily would have had to be determined,² if the fine spirit of co-operation on the part of said attorney and his clients had not prevailed, the court would have had to follow the ruling In re Ideal Laundry, Inc., *supra*. Had the latter situation arisen, the bankrupt's estate would have been deprived of valuable properties, as hereinafter pointed out. I, therefore, concluded that in advising his clients to deal generously with the estate on a purely equitable basis, rather than a strictly legal basis, and thus lending his aid toward the creation of valuable assets where these particular assets, so far as this bankrupt's estate is concerned, otherwise, were non-existent, the legal services rendered by said attorney was reasonably worth the sum of \$2500.00. In other words, I look thus upon the situation presented. [82]

Without the attorney's co-operation and had he insisted that the court deal with the properties involved entirely on the hard-and-fast legal basis of reclamation, the estate, based upon the appraised value,³ would have lost more than \$40,000.00 in

²In re Hager (D.C., Ia.) 166 F. 972, 974.

³Later, according to the record to which the court has the right to look, *Dimmick v. Tompkins*, 194 U.S. 540, 548, 24 S. Ct. 780, 782, 48 L. Ed. 1110,

assets, together with a reasonable attorney's fee for carrying through the reclamation matter. Inasmuch as the attorney's co-operation so served to enrich the estate, as aforesaid, I felt that, in justice to all concerned, I should apply one of the very old rules of jurisprudence, "He who takes the benefit must bear the burden."

The estate had benefited to the extent of in excess of \$40,000.00 and had so benefited because of said attorney's efforts. Surely, I reasoned, that since the estate directly has, and those interested therein indirectly have, gained out of nothing such a large amount of assets, no interested party justly can complain if the one who legally, and without criticism, could have prevented such gain, is amply paid for so using his legal ability and good judgment equitably to benefit the bankrupt's estate, without equitably denying to his clients that which is due them, considering the matter solely from an equitable standpoint, as should a court which—as does a bankruptcy court—operates on equitable principles.⁴ [83]

1114, *Freshman v. Atkins*, 269 U.S. 121, 124, 46 S. Ct. 41, 42, 70, L. Ed. 193, 195, *Bowe-Burke Mining Co. v. Willcutts* (D.C., Minn.) 45 F. (2d) 394, 395, these properties were sold for \$52,000.00.

4" . . . the bankruptcy court may dispose of matters which come before it, upon equitable principles, when justice and equity require that it should do so." *In re Larkey* (D.C., N.J.) 214 F. 867, 871, 872.

Bankruptcy courts are "essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan v. Hunt*, 292 U.S. 234, 240, 54 S. Ct. 695, 78 L. Ed. 1230; *Pepper v. Litton*, 308 U.S. 295, 304, 60 S. Ct. 238, 84 L. Ed. 281.

PAPERS HANDED UP HEREWITH

I hand up herewith the following papers:

1. Petition for an Order of Sale (Denton Sawmill);
2. Order to Show Cause (Denton Sawmill);
3. Petition in Reclamation;
4. Order to Show Cause and Setting Day of Hearing;
5. Answer of Trustees in Bankruptcy to Petition in Reclamation of DeLancey Lewis, et al.;
6. Answer of West Coast Redwood Corporation and DeLancey Lewis and Doris B. Lewis to Petition for an Order of Sale (Denton Sawmill);
7. Return of Sale of Real and Personal Property;
8. Stipulation re Willits Sawmill;
9. Order Clearing Title, Determining Amounts Due under Liens, and of Sale; and
10. Petition for Review of Referee's Order by Judge.

Dated: July 11, 1946.

Respectfully submitted,

/s/ BURTON J. WYMAN,

Referee in Bankruptcy. [84]

EXHIBIT A

“The undersigned, William W. Denton and William H. James, both of Oakland, California, hereby offer to purchase from West Coast Redwood Corporation, a corporation, hereinafter called ‘West Coast’, all of that certain sawmill equipment, including all saws, machinery and other necessary tools for use in connection with the operation of said mill, more specifically set forth in that inventory thereof prepared by the undersigned, together with those three certain forty acre tracts of land purchased by the undersigned from Union Lumber Company, and including the existing option covering six additional forty acre tracts of land, which option is contained in letter addressed to said West Coast and dated May 3, 1943, and filed with Reconstruction Finance Corporation, hereinafter called ‘RFC’, in connection with the loan of said RFC to said West Coast.

“1. The undersigned offer to purchase all of the foregoing, being all of the physical assets of said West Coast, for the total sum of fifty thousand (50,000.00) dollars. The undersigned agree to pay said sum in the following manner:

“(a) By delivery to West Coast of a bankable promissory note in the sum of forty-five hundred (4500.00) dollars, payable on or before six (6) months from date, on which note said West Coast shall be able to realize said sum of forty-five hundred dollars without discount in order to enable it to pay said amount to RFC under its aforesaid

loan. Said note shall be delivered on execution hereof.

“(b) On the same date, the further sum of eighteen hundred twenty-two and 92/100 (1822.92) dollars, plus interest from December 27, 1943, to the Collector of Internal Revenue on account of the liability of West Coast for withholding taxes withheld from employees of West Coast;

“(c) The balance by delivering to West Coast one-half the entire output of lumber and other forest products from said mill and property for a period of six months from and after the date hereof, provided, however, that the undersigned agree to either pay in cash or in such lumber and forest products an amount sufficient to satisfy the requirements of said RFC loan to said West Coast, as a minimum monthly payment hereunder. If, at the expiration of said period of six months, the undersigned should decide to abandon operations, there shall be no obligation on them, or either of them, hereunder, save and except for one-half of the output of said mill and property or said minimum requirement of said RFC to the date of such abandonment (whichever amount may be larger), and in such event said West Coast shall have full and unimpaired title to all of the property herein agreed to be conveyed, together with such additions and improvements as the undersigned may have installed. The undersigned hereby specifically agree that all additions, replacements and improvements installed upon said property shall immediately be-

come and be the property of said West Coast subject to the terms hereof. In lieu of the delivery of said one-half of said entire output, the undersigned may pay in cash the value thereof after satisfying said West Coast as to such value. In no event shall the monthly payments hereunder be less than the amount due R.F.C. under its loan. [85]

“The decreasing balance of said purchase price of fifty thousand (50,000.00) dollars shall bear interest at the rate of four (4) per cent per annum, and the payments shall be applied first to interest unpaid and balance toward principal.

“2. The undersigned further agree to improve said mill, by the addition of work, labor and materials, in a minimum value of three thousand (3000.00) dollars, and to have available sufficient operating capital in order to properly carry on the operations of said mill.

“3. The undersigned further agree that none of their rights hereunder shall be assignable, except to Christ's Church of the Golden Rule without the written consent of West Coast first had and obtained.

“4. The undersigned further agree to acquire from DeLancey Lewis and Doris B. Lewis, two hundred eight-six (286) acres of land in Mendocino County, together with timber and water rights, at a price of forty-three hundred sixty (4360.00) dollars, ten acres of which shall consist of the millsite upon which the mill of said West Coast is now

located and which is now subject to a lease from said DeLancey Lewis and Doris B. Lewis to said West Coast. Said contract of purchase shall be assigned to said West Coast to be held by it as security hereunder for the performance of the obligations of the undersigned, with the understanding that said West Coast may further assign said contract of RFC as further security for its advances to West Coast. All of said assignments shall be held in escrow by Title Insurance & Guaranty Company for the account of all interested parties.

“5. In the event of any default hereunder on the part of the undersigned in making any payment herein provided, and the continuance of such default for a period of thirty (30) days from and after written notice by West Coast to the undersigned, the undersigned shall surrender all rights hereunder and all right, title and interest of the undersigned in and to the property herein agreed to be conveyed, together with the improvements, additions, betterments and replacements installed by the undersigned, to said West Coast free of any obligation hereunder and from any claim of the undersigned.

“6. In the event of the acquisition of said property from DeLancey Lewis and Doris B. Lewis, as hereinbefore provided, there shall be no rental charged against West Coast for the use of said property so acquired or any thereof, and in the event of any subsequent default of the undersigned

hereunder such property so acquired from DeLancey Lewis and Doris B. Lewis shall be subject to the lien of said loan from said RFC to said West Coast as though said property was owned by said West Coast.

“7. The undersigned shall conduct all operations of said mill property at their own cost and expense and under their own name or names, or a name selected by them not similar to the name of said West Coast, and without any obligation or responsibility whatsoever on the part of West Coast, and the undersigned agree to carry complete and adequate insurance to protect the interests [86] of West Coast in connection with the operation of said mill by the undersigned.

“8. The undersigned further agree to maintain and carry any and all insurance required to be kept by the terms of the loan to West Coast by RFC, insuring the interests of all parties as they may appear, and all insurance premiums shall be pro rated to the date of the execution hereof.

“9. It is further understood that the undersigned shall have no title to any of the property hereinbefore mentioned until the full amount of said purchase price of fifty thousand (50,000.00) dollars and interest shall have been paid to West Coast as herein provided, at which time proper deeds and bills of sale shall be delivered to the undersigned.

“Deeds and bills of sale shall be prepared and

executed by West Coast and delivered in escrow to Title Insurance and Guaranty Company in San Francisco, subject to delivery upon complete performance in accordance with the terms hereof.

“10. In the event of any action being brought to enforce any of the terms hereof by either party, it is further agreed that the prevailing party in such action shall be entitled to reasonable attorney’s fees to be fixed by the court and taxed as part of the costs of suit in such action.

“11. It is expressly understood that in the event of any default of the undersigned, as herein before provided, all payments theretofore made by them hereunder to West Coast or for its account, or in the acquisition of or payment for any improvements, additions or betterments, shall be deemed to be rental for the use of the property covered hereby, and that, upon the termination of the rights of the undersigned hereunder by reason of such default, all rights of the undersigned to any sums so paid for such additional property, improvements or betterments, shall cease and terminate.

“12. The undersigned further agree to acquire from Union Lumber Company, in accordance with the terms of said outstanding option, the property therein specified, provided that said West Coast shall obtain an extension of sixty (60) days for the exercise of the option as to the next additional parcel to be obtained thereunder, in order to have available timber land for the supply of timber to said mill. All properties obtained under such

option by the undersigned shall be immediately assigned and transferred to West Coast, so that West Coast may in turn subject the same to the lien of the encumbrance held by said RFC pending final consummation of this agreement, at which time such property shall be transferred to the undersigned.

“13. West Coast shall have at all time the right to enter the premises covered by this agreement to inspect the same and to examine the books, papers and records of the undersigned, relative to their operation of any business conducted by them, on the premises covered hereby.

“14. The undersigned agree to keep full, true and accurate books of account reflecting the business operations of said mill property, showing completely and truly all of the timber and other products cut or removed or manufactured from or on said premises. [87]

“15. The undersigned agree that they shall not remove from the premises covered hereby, or any property added hereto, any of the improvements, tools, equipment (excluding motor-vehicles or live-stock) or buildings of any kind or character, without the written consent of West Coast first had and obtained.

“16. Performance of all of the terms hereunder is subject to any delays caused by acts of war, acts of God, strikes, lockouts or any other cause beyond the control of either of the parties hereto.

“17. West Coast shall take care of and satisfy

all of its outstanding obligations and indemnify and hold harmless the undersigned for all damages, loss, cost and expensed occasioned by reason of any failure of West Coast to pay any of its obligation, subject to the terms hereof.

“18. Any notice required hereunder to be given to the undersigned shall be mailed by United States registered mail, with return receipt requested, addressed to either or both of the undersigned, with postage fully prepaid thereon at Willits, California. Any notice required hereunder to be given to West Coast shall be mailed by United States registered mail, with return receipt requested, addressed to said West Coast Redwood Corporation, in care of Theodore M. Monell, 1085-7 Mills Building, San Francisco, 4, California.

“In Witness Whereof, the undersigned have hereunto subscribed their names this 28th day of February, 1944.

“WILLIAM W. DENTON,

“WILLIAM H. JAMES.

“The foregoing offer is hereby accepted. March 22, 1944.

“WEST COAST REDWOOD
CORPORATION,

“By A. R. PETTEY,
President,

“And THEODORE M. MONELL,
Assistant Secretary.” [88]

“This Agreement, made and entered into this 6th day of April, 1944, by and between William W. Denton and William H. James, both of Oakland, California, and West Coast Redwood Corporation, a corporation,

Witnesseth

“Whereas, said William W. Denton and William H. James did, under date of February 28, 1944, make a written offer to said West Coast Redwood Corporation, a corporation, to purchase its sawmill, which offer was accepted under date of March 22, 1944; and

“Whereas, said offer and acceptance does not express the full intentions of the parties in that it omits any provision for the payment of the balance of the purchase price in the event that the undersigned continue the operation of said mill;

“Now, Therefore, It Is Understood and Agreed that said offer and acceptance may be modified to add thereto as sub-paragraph ‘(d)’ of paragraph ‘1’, the following:

‘(d) The balance of said purchase price of fifty thousand (50,000.00) dollars, in the event the undersigned continue with the operation of said mill property and do not decide to abandon operations as hereinbefore provided, by delivering to West Coast one-half the entire output of lumber and other forest products from said mill and property, as the same are cut and acquired by the undersigned until the entire balance of said purchase price to-

gether with interest thereon shall have been fully paid. Provided, however, that the monthly payments hereunder, after payment in full of said RFC obligation, shall not be less than the sum of two thousand (2000.00) dollars per month, and the entire balance of said purchase price shall be fully paid to West Coast not later than October 1, 1945.

“It is further understood that all cut timber on said premises may be cut and manufactured into lumber by the undersigned pursuant to the terms hereof.”

“WILLIAM W. DENTON,

“WILLIAM H. JAMES.

“WEST COAST REDWOOD
CORPORATION,

“By A. T. PETTEY,

“And THEODORE M. MONELL.”

EXHIBIT B

“Memorandum of Agreement, made and entered into this 28th day of February, 1944, by and between DeLancey Lewis and Doris B. Lewis, his wife, of San Mateo County, California, hereinafter called ‘First Parties’, and William W. Denton and William H. James, both of Oakland, California, hereinafter called ‘Second Parties’,

“Witnesseth

“Whereas, First Parties are the owners of certain properties hereinafter described, a portion of

which is the millsite on which the mill of West Coast Redwood Corporation is presently situated; and

“Whereas, Second Parties desire to purchase said property for the total sum of forty-three hundred sixty (4360.00) dollars, on the terms and conditions hereinafter set forth; and

“Whereas, Second Parties are, under even date herewith, entering into an option agreement covering the purchase of certain mill equipment and property of West Coast Redwood Corporation; and

“Whereas, said DeLancey Lewis is an insurance broker, and First Parties are willing to sell said property to Second Parties in accordance with the terms hereof, including the right to act as exclusive insurance broker for Second Parties as herein provided,

“Now, Therefore, It Is Hereby Understood and Agreed, by and between the respective parties hereto, as follows:

“1. First Parties hereby agree to sell, assign, transfer and convey unto Second Parties the following described property situated in the County of Mendocino, State of California, to-wit:

“Parcel One: Lot 2, Section 30, Township 19 North, Range 14 West, M.D.B. & M.

“Parcel Two: Southwest $\frac{1}{4}$ or Southeast $\frac{1}{4}$ of Section 10, Township 19 North, Range 14 West, M.D.B. & M.,

“Parcel Three: All that certain property described in a deed from First Parties to Geo. J. Stempel, et ux., recorded in Book 163 of Official Records, as an exception of 208 acres not included in the granting clause of said deed.

“2. First Parties agree to sell said property, together with all timber and water rights owned by First Parties, to Second Parties for the total sum of forty-three hundred sixty (4360.00) dollars, payable as follows:

“Five Hundred (500.00) dollars upon the execution hereof, receipt whereof is hereby acknowledged by First Parties, and the balance in seventeen (17) equal monthly installments of two hundred twenty-seven and 06/100 (227.06) dollars, or more, plus interest on the unpaid principal at the rate of six (6) per cent per annum, principal and interest payable in lawful money of the United States, on the 1st day of each and every month commencing April 1, 1944, until the full purchase price shall have been paid. [90]

“3. Sellers agree, upon payment in full for said property, to transfer the same free and clear of all liens and encumbrances, excepting easements of record, to Second Parties, together with all improvements now on said property

“4. Second Parties promise and agree to pay said sums aforesaid at the times and in the manner above set forth, and further agree to pay all taxes and assessments charged against said property until Second Parties shall have paid in full therefor.

“5. Second Parties further agree to keep the improvements on said property in good order, condition and repair, and to keep the same insured for the benefit of the respective parties hereto, as their interests may appear, in insurance companies satisfactory to First Parties.

“6. Second Parties agree that all improvements installed by them on said premises, excepting movable fixtures, shall immediately become part of the realty and belong to First Parties and that Second Parties shall have no interest therein or claim thereto, or any part thereof, until payment in full of all sums due from them hereunder.

“7. Second Parties further hereby appoint said DeLancey Lewis as their exclusive insurance broker, for a period of five years from and after the date hereof, to handle for them the placing of all insurance required or carried in connection with the operation of said saw mill and property and agree that no other agent or broker shall act for them, or either of them during said period, and that all insurance carried in connection with said business shall be placed through said DeLancey Lewis and not otherwise handled or placed. Provided, however, that said DeLancey Lewis shall at all times use his best efforts to effect such economies in the placing of such insurance as any other prudent insurance broker would under like circumstances.

“8. First Parties further agree to execute a deed for the property hereinbefore described to Second Parties and to deposit such deed with Title Insurance and Guaranty Company, in San Francisco, with

instructions to deliver same upon payment in full of all sums due hereunder to First Parties.

“9. In the event of any action or proceeding being brought by either party hereto to enforce any of the terms hereof, it is further agreed that the prevailing party in such action or proceeding shall be entitled to reasonable attorney’s fees, which shall be fixed by the court and taxed as costs of suit in such action or proceeding.

“In Witness Whereof, the parties heretofore have executed this agreement the day and year first herein written.

“DeLANCEY LEWIS,

“DORIS B. LEWIS,

First Parties.

“WILLIAM W. DENTON,

“WILLIAM H. JAMES,

Second Parties.”

[Endorsed]: Filed July 11, 1946. C. W. Calbreath, Clerk. [91]

Law Offices of Grainger and Hunt

Sept. 16, 1946.

Hon. Michael J. Roche.,

U. S. Courthouse Bldg.,

7th and Mission Sts.,

San Francisco

Dear Judge Roche:

in re Christ’s Church of the Golden

Rule, bankrupt No. 36,408-R

Now that the court has granted, by consent, the trustees’ motion for an order clarifying and dis-

regarding an approval of the order of Referee in Bankruptcy Wyman, dated May 27, 1946, wherein he awarded the sum of \$2500.00 to attorney Theodore Monell as attorney's fees for legal services in connection with his representation of the holders of conditional sales contracts upon property of the bankrupt estate in proceedings before the Referee, the only matter left for determination, and on its merits, is the trustees' petition for a review of that order. This petition came on for hearing on July 29th last, at which time the court made an order submitting the matter upon briefs. At that time the trustees filed their opening brief. Today Mr. Monell presented a reply to that brief in the form of "Consent to order clarifying approval of order and motion supporting referee's order fixing attorney's fee re Denton-James Sawmill". The trustees will not file any answer to this reply.

The petition for review of the referee's order stands submitted to you for decision upon the following papers:

1. The trustees' petition for review.
2. The referee's certificate on review.
3. The trustees' opening brief.
4. The reply thereto of Theodore Monell (Consent to order clarifying approval of order and motion supporting referee's order fixing attorney's fee re Denton-James Sawmill).
5. This letter.

This morning, based upon information furnished to me by the title company handling the escrow in

connection with the sale of the Denton-James (Wil-lits) Sawmill. I stated to you in open court that, if the \$2500 fee was allowed to Mr. Monell, the bankrupt estate would receive a net of about \$3800 from the transaction. After checking again with the title company, I find that this statement was erroneous. It left out of consideration the original deposit of \$5200.00 with the trustees by the purchasers. If the \$2500 fee is allowed, the estate will received a total of \$8919.19, instead of \$3800.00. In other words the maximum available from the transaction for the final amount allowed Mr. Monell, and for the estate, is about \$11,500.00. In the trustees' brief it is stated that the maximum would be about \$12,000.00.

I am sending a copy of this letter to Mr. Monell.

Very truly yours,

REUBEN G. HUNT.

(Affidavit of Clerk attached.)

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER CLARIFY-
ING APPROVAL CONTAINED IN REF-
EREE'S ORDER NOW ON REVIEW AND
DIRECTING THAT SUCH APPROVAL
BE DISREGARDED ON THE REVIEW

To. Theodore M. Monell:

You Will Please Hereby Take Notice that on Monday, September 16, 1946, at 10:00 a.m., at the court room of the above entitled court, in the United States Courthouse Building, 7th and Mission

Streets, San Francisco, California, Division of Judge Michael J. Roche thereof, Paul W. Sampsell, L. Boteler, and Stewart McKee, the Trustees in Bankruptcy of the Estate of the above named bankrupt corporation, will move said court for an order clarifying and disregarding the stipulation in the form of an approval in writing by Reuben G. Hunt, one of the counsel for said Trustee, at the end of the order made and entered herein on May 27, 1946, by Burton J. Wyman, a Referee in Bankruptcy of the court, entitled: "Order Clearing Title, Determining Amount Due Under Liens, and of Sales," and relating to the disposition of a sawmill which was an asset of the bankrupt estate and located near Willits, Mendocino County, California, in so far as said order relates to the award of \$2500.00 attorney's fees to Theodore Monell. The purpose of the motion is [93] to clarify the approval so that it will be deemed an approval as to form only, and not an approval as to substance, and not a consent to the award of attorney's fees or a waiver of the right to have such award reviewed by a judge of the court; and, when so clarified, to have such approval disregarded in connection with the review herein of the referee's said order so that such review may be considered on its merits by the judge, irrespective of any such approval.

The motion will be based upon all the pleadings, papers, records and files herein, this notice of motion, the Affidavits of Reuben G. Hunt and the three Trustees in Bankruptcy hereto attached and

made a part hereof, and the points and authorities served and filed concurrently herewith.

The motion will be made upon the following grounds:

1. If said approval is to be construed as the consent by said counsel, on behalf of the Trustee in Bankruptcy, of an award to Theodore M. Monell of \$2500.00 attorney's fees, and a waiver of the right of said Trustees to have said award reviewed by a judge of this court, then such approval is void because said Trustees' counsel never had express authority to give such consent on their behalf, and any such consent would be contrary to, and in violation of, their express instructions to their said counsel to have said award reviewed by a judge of this court.

2. If said approval is to be construed as an agreement between counsel for the award to Theodore Monell of the said attorney's fees, such agreement is void under the provisions of The Borah Act of August 25, 1937, 28 USC, Secs. 572a and 531.

3. If said approval is to be construed as an agreement between Theodore Monell and the Trustees in Bankruptcy for the award to Theodore Monell of said attorney's fees, such agreement is void under the provisions of The Borah Act of August 25, 1937, 28 USC, Secs. 572a and 531. [94]

4. The said Reuben G. Hunt, in preparing and signing said approval, never intended other than to approve, on behalf of the Trustees, the said order

as reflecting the form which the referee directed to be prepared, and never intended to approve on behalf of the Trustees, or otherwise, the substance of the said order, or to consent to the award of said attorney's fees, or to waive the right of the Trustees to have said award reviewed by a judge of this court, for the reason that said Reuben G. Hunt had previously been expressly instructed by said Trustees to take the proper steps at the proper time to have the said award reviewed by a judge of this court.

5. Any such consent, even though valid, would not be binding upon the judge of this court, because the judge may, at any time before the close of this case, and upon his own motion, and without petition, review an administrative order of a referee such as the allowance of compensation.

6. The granting of said motion will not prejudice said Theodore Monell and will place him in the same position he was before the approval was signed.

7. In so far as the said approval does not indicate that it is intended as to form only, and not as to substance, and that it was not intended as a consent to the award of attorney's fees, or as a waiver of the right to a review by the judge of the court of such award, such uncertainty is due to the mistake, inadvertence, surprise and excusable neglect of Trustees' counsel from which he and the Trustees should be relieved in the interests of justice and the protection of the interests of the creditors

of the bankrupt estate, since the amount finally awarded must be paid out of the bankrupt estate.

Dated this 5th day of August, 1946.

IRVING M. WALKER,
GRAINGER AND HUNT,

By /s/ REUBEN G. HUNT,

Attorneys for Trustees. [95]

AFFIDAVIT OF REUBEN G. HUNT

State of California,

County of Los Angeles—ss.

Reuben G. Hunt, being first duly sworn, deposes and says:

I am a member of the Law Firm of Grainger & Hunt, of Los Angeles, the other member being Kyle Z. Grainger. On or about January 10, 1946, with the approval of the court, the said firm was employed as general counsel, together with Irving M. Walker, of Los Angeles, by Paul W. Sampsell, L. Boteler and Stewart McKee, the Trustees in Bankruptcy of the Estate of Christ's Church of the Golden Rule, a corporation.

The bankruptcy was commenced November 1, 1945, in the United States District Court for the Central Division of the Southern District of California, as the court of primary jurisdiction. On November 27, 1945, ancillary proceedings in bankruptcy in aid of said court of primary jurisdiction were commenced in the above entitled court, in the above entitled case, and are now pending by refer-

ence, before Burton J. Wyman, a Referee in Bankruptcy of the above entitled court. On January 5, 1946, Paul W. Sampsell, L. Boteler and Stewart McKee, all of Los Angeles, were qualified as Trustees in Bankruptcy of the estate, and ever since have been, and now are acting as such.

One of the assets of the bankrupt estate was a sawmill located near Willits, Mendocino County, California, commonly referred to as the "Willits Sawmill". Real and personal property was involved in the sawmill. The real estate, and a portion of the personal property, were subject to conditional sales contracts upon which balances were due. Theodore M. Monell, an attorney of San Francisco, represented DeLancey B. Lewis, and Doris B. Lewis, [96] his wife, who held a conditional sales contract on the real estate, and West Coast Redwood Corporation, a corporation, which held a conditional sales contract upon a portion of the equipment. Attachment and execution liens had been levied upon a portion of the personal property after the commencement of bankruptcy without the permission of the bankruptcy court. The Trustees filed a petition for the determination of these matters and a petition for an order of sale of the property. Mr. Monell filed an answer to these petitions on behalf of his clients. Also on behalf of his clients, he filed a petition in reclamation of the property covered by the said conditional sales contracts, to which the Trustees filed an answer.

The issues raised by these pleadings were heard

before Referee Wyman on April 15, 1946, at his courtroom in San Francisco. At the conclusion of the hearing on that day he announced his decision. This was to the effect that the Trustees in Bankruptcy should either sell the property prior to June 1, 1946, and pay off these balances due on conditional sales contracts, or return the property to the holders thereof, and that the Trustees should pay out of the bankrupt estate to Mr. Monell, as attorney for the holders of these contracts, the sum of \$2500.00 as attorney's fees pursuant to the terms of the contracts, instead of \$3500.00 as requested by him. The referee directed that counsel prepare and submit to him a formal written order to that effect, approved by all counsel involved. Other matters were to be taken care of in the written order, but they do not concern us here.

On or about April 18, 1946, immediately upon my return to Los Angeles, I communicated orally to the Trustees in Bankruptcy the said directions of the referee. They then stated to me that they were satisfied with all portions of the order, except that portion awarding attorney's fees in the sum of \$2500.00 to Mr. Monell, and that they considered such an award unreasonable and [97] excessive and desired me, on their behalf, to file with the referee and prosecute to a final conclusion, their petition to review such portion of the order awarding such attorney's fees. Their instructions to me in this respect have never been altered, modified, or abrogated. On or about June 1, 1946, I prepared on their behalf, such a petition to review, which they

signed and verified and which was filed with Referee Wyman on or about June 6, 1946. Later the Referee filed herein his certificate on review. The hearing of the review came up before the above entitled court on July 29, 1946, Judge St. Sure presiding in the absence of Judge Roche, and an order was made whereby the Trustees file their opening brief, Mr. Monell was given 20 days thereafter in which to file an answering brief, and the Trustees were given ten days thereafter in which to file a reply brief, the review then to stand submitted for decision.

Shortly after April 18, 1946, and after I had received such instructions to review the award of counsel fees, I prepared a proposed draft of the Referee's order pursuant to his directions made April 15, 1946, and sent a copy thereof to Mr. Monell for his objections and suggestions. He wrote back to me that the form proposed was satisfactory to him. There were other counsel involved representing other clients, and I sent them the same proposed draft and invited their comments. It was not until sometime in May, 1946, that I completed my canvas of the counsel involved, and started to prepare the final draft. This final draft carries the following at the end, after the signature of the referee: "The foregoing order is hereby approved this day of April, 1946, Grainger & Hunt, by Reuben G. Hunt, Attorneys for Trustees in Bankruptcy". Then follows a similar approval by the other counsel involved, including Theodore M. Monell. This final draft was signed, filed and entered

by Referee Wyman on May 27th, 1946. The petition for review of that part of the order awarding attorney's fees was [98] filed within ten days thereafter, as required by Sec. 39c of the Bankruptcy Act. The preliminary draft of the order carried with it a form for approval as of an unnamed date in April, 1946, but owing to unavoidable delay, the approval was not signed by all counsel until after the middle of May, 1946, and by myself last, although no one corrected the date of the approval.

When I prepared the preliminary draft, and the final draft, of the order, and when I signed the final draft on behalf of the Trustees in Bankruptcy, I did not have in mind, nor did I intend to approve in substance on their behalf, the award of the attorney's fees to Mr. Monell, or to consent to the award on their behalf or to waive on their behalf, their right to a review by the judge of that portion of the order awarding attorney's fees. My sole intention in preparing the approval in the form I did, and in signing the approval as prepared, was to signify only that I was satisfied that the order reflected the referee's directions as announced by him on April 15, 1946, at the time of the hearing. I never at any time, either at the time of signing the said approval, or otherwise, had any intention of consenting, on behalf of the Trustees, to the award of attorney's fees in the sum of \$2500.00, or any other amount, to Mr. Monell, or of waiving, on behalf of the Trustees, their right to have such award reviewed by the judge. My instructions from the Trustees, as I have stated above, were directly

to the contrary. There were never any discussions between myself and Mr. Monell concerning whether or not the Trustees objected to or consented to the award, or waived the right to appeal. Such matters were never mentioned between us. The failure, if any, of the form of said approval to express my intentions as above outlined, is due to my mistake, inadvertence and excusable neglect.

After the hearing before Judge St. Sure on July 29, 1946, Mr. Monell intimated to me that he regarded the said approval on my part as a bonding consent on the part of the Trustees [99] to the award of attorney's fees made to him, and a binding waiver of the right to review the award. I then told him that I never had any such intention in signing the approval, and that the Trustees had, from the beginning, instructed me to have the award reviewed. That was the first time I became aware of any such contention on his part. I immediately notified the Trustees of such contention, and they thereupon instructed me to present to the court for its consideration a motion for an order clarifying the approval and directing that such approval be disregarded on the review, and the petition for review prosecuted to a final determination.

The clarification of said approval to mean that is only an approval as to form, and is not a consent to the award of attorney's fees, and is not a waiver of the right to have such award reviewed by a judge of this court, will not prejudice Mr. Monell in any way, or do him an injustice, since the award

stands and he will receive the amount allowed by the Referee, unless reversed or modified by the judge.

/s/ REUBEN G. HUNT,
Affiant.

Subscribed and sworn to before me this 5th day of August, 1946.

[Seal] /s/ BESS A. ALDRICH,

Notary Public in and for the
County of Los Angeles,
State of California. [100]

AFFIDAVIT OF TRUSTEES IN BANKRUPTCY

State of California,
County of Los Angeles—ss.

Paul W. Sampsell, L. Boteler, and Stewart McKee, the Trustees in Bankruptcy of the estate of the above named corporation, being each duly sworn, each for himself, and not one for the other, deposes and says:

I have read the affidavit presented herein by Reuben G. Hunt, of the Law Firm of Grainger & Hunt, one of our counsel, in connection with our motion to clarify and have disregarded a certain approval to an order of Referee in Bankruptcy Wyman now on review, and am familiar with the contents of said affidavit. The said affidavit of Reuben G. Hunt is true to the best of my knowledge, information and belief.

I have always felt, and do now feel, that the Referee's award of attorney's fees to Theodore M. Monell was unreasonable and excessive, and that, in the interest of the creditors of the bankrupt estate, who are its beneficiaries, and whom we represent, the said award should be reviewed by a judge of this court to the end that justice will be done to all concerned, including the creditors of the estate who are its beneficiaries and for whom I am Trustee.

I have never consented to such award, or to the entry of a judgment for the amount awarded by the Referee, or any other amount, nor have I ever waived the right to have said award review by a judge of this court. I have never instructed our counsel, Reuben G. Hunt, to give any such consent or make any such waiver on behalf of the Trustees. If the approval signed by our counsel be construed to mean a consent to such award, or a waiver of the right to review, or both, then such approval is hereby repudiated and rejected. The fact of such approval was never brought to my attention until the date of this affidavit. [101]

I make this affidavit as a Trustee in Bankruptcy of the estate of the above named corporation.

/s/ PAUL W. SAMPSELL,

/s/ L. BOTELER,

/s/ STEWART McKEE,

Trustees in Bankruptcy of Christ's Church of the
Golden Rule, a corporation, Bankrupt.

Subscribed and sworn to before me this 5th day of August, 1946.

[Seal] /s/ BESS A. ALDRICH,

Notary Public in and for the
County of Los Angeles,
State of California.

[Endorsed]: Filed Aug. 8, 1946. C. W. Calbreath, Clerk. [102]

[Title of District Court and Cause.]

CONSENT TO ORDER CLARIFYING APPROVAL OF ORDER AND MOTION SUPPORTING REFEREE'S ORDER FIXING ATTORNEY'S FEE RE DENTON-JAMES SAWMILL

There is presently pending before this Court a petition for an order to clarify the approval by counsel of the order which is here sought to be reviewed. In brief it is probably sufficient to state that counsel for the trustees in preparing the order sought to be reviewed had added an approval by the various interested attorneys. Such approval might well be considered an approval of the amount of the fee allowed to the attorney for West Coast Redwood Corporation, DeLancey Lewis and his wife, and thus render moot the question presented for review. Counsel for the trustees seeks to limit his approval and that of all interested counsel to the form only of the order and not its substance. The writer is the only person who would be affected

by the suggested clarification, as it is his fee which is sought to be reduced. The writer states that although he considered the approval [103] to have been given by all parties as to substance as well as form, he gladly consents to the proposed clarification to permit this Honorable Court to consider the matter of the fee allowed on its merits. Thus any embarrassment to counsel for the trustees will be obviated. The writer feels his position is now justifiable for his clients have in the last few days received all of the proceeds of the sale, including interest, to which they were entitled under the proceedings instituted by them.

Accordingly, there is only left for the determination by this Honorable Court the reasonableness of the fee of \$2500 awarded by the Referee to the writer for his services.

In considering the question presented we feel that it is so clearly a matter within the discretion of the Court that the citation of authorities upon the proposition is unnecessary, for the basis of fees is one clearly within the knowledge of the Court and it is conceded that the authorities have unanimously decided that a Court may award fees based upon his knowledge and general experience. This Court is, of course, very amply qualified in this respect.

It is therefore proper to examine the record to analyze the service performed and the decision of the Referee. First, there was a lengthy petition in reclamation filed in behalf of West Coast Red-

wood Corporation covering the mill equipment, etc., and on behalf of DeLancey Lewis and his wife covering the real property and improvements, both claimants appearing by one petition. The amount involved was in excess of \$31,000, plus interest. Next, a simple answer to the trustees' petition for an order of sale was prepared and filed. An order to show cause was issued in connection with the reclamation petition, and a hearing was held and numerous conferences were had. It is to be noted that the period of time consumed commenced from the default of the [104] vendees in October 1945 and extended through the time of the hearing in April 1946 and thereafter. This period may not be ignored in considering the time and effort devoted to protecting the rights of the writer's clients herein. Also, it would be noted that the proceeding was entirely successful, and although realization and collection of the amounts due was delayed until September 12, nevertheless the claimants recovered interest to the time of payment as well as principal due.

Counsel for the trustees points out the simplicity of the situation. This contention, however, is belied by his opposition to the certificate and report of the Referee below. This report states that the claimants had the absolute right to the property in view of the terms of the executed contracts; counsel for the trustees objects vehemently to this statement, claiming otherwise under different decisions. These are matters which the writer had to determine before proceeding. It might be stated that serious

consideration was given to the alternative situations presented, and the writer deemed it expedient to file the claim as presented, with the result that his clients have collected in full over \$32,000 under their agreements. It was appreciated that a different procedure might have been followed, but the speculative possibilities of facing complex litigation and also a change in market conditions later on should such litigation be unsuccessful were outweighed by the prospects of a speedy adjustment and collection of cash immediately.

We find further disagreement between counsel and the Referee, also belying the simplicity of the problem presented, in the measurement of the fee itself. The Referee stated that he based same partially upon the recovery to the bankrupt of a net asset to which it otherwise would not have been entitled. Counsel for the trustees states that the fee should be measured by the [105] benefit to the particular clients of the writer. With this contention we agree, inasmuch as the contracts provided for reasonable fees to be allowed in any action or proceeding by either party to enforce any of the terms of the agreements. We feel that the proper basis of the allowance is the services rendered to the claimants who were, after all, the clients of the writer.

The petition prayed for a total fee of \$3500 and the Referee, without any discussion and upon the simple submission of the matter (see page 13 of the certificate of Referee), allowed a fee of \$2500.

There was no objection thereto or even slight suggestion of opposition to this amount at that time. We feel that an allowance of \$2500 on a total collection of over \$32,000, slightly under 8% is a very modest charge to be allowed on a matter of such importance. Counsel for the trustees makes much of the simplicity of the matter presented. It must not be overlooked that this simplicity was created by the fact that no objections could be interposed to claimants' petition. Had claimants been improperly or inadequately represented, a different situation would naturally have been presented. The writer feels, in all modesty, that his experience in over twenty-five years of practice added at least partially to the success of the proceeding and to the fact that the matter was amicably adjudicated. The authorities cited by counsel for the trustees, as well as by the Referee in his certificate, clearly hold that the amount involved and results achieved should be considered in fixing fees in these matters. It is clear that the Referee had a complete grasp of the situation and his order is not being attacked on any basis of lack of integrity but purely because of a claimed abuse of discretion. We feel that the Referee's order was fair and reasonable and should be sustained.

Respectfully submitted,

/s/ THEODORE M. MONELL.

[Endorsed]: Filed Sep. 16, 1946. C. W. Calbreath, Clerk. [106]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday the 16th day of September, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Michael J. Roche, District Judge.

No. 30217

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,
Debtor.

ORDER GRANTING MOTION TO CLARIFY
REFEREE'S ORDER

This matter came on regularly this day for hearing on motion to clarify Referee's order. After hearing Reuben Hunt, Esq., attorney for trustee, and Theodore Monell, Esq., it is, by stipulation, Ordered that said motion be and the same is hereby granted. On motion of Mr. Hunt, Ordered that the petition for review of fee awarded Theodore Monell be submitted. [107]

[Title of District Court and Cause.]

The petition of Paul W. Sampsell, L. Boteler and Stewart McKee, Trustees for review of the Referee's order of May 27, 1946, insofar as said

order allowed to Theodore M. Monell counsel fees in the sum of \$2500.00, having been heretofore heard and submitted and being now fully considered, it is by the Court

Ordered that said order allowing counsel fees in the sum of \$2500.00 be and the same is hereby confirmed.

Dated: September 24th, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Sept. 24, 1946. C. W. Calbreath, Clerk. [108]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 36,408-R
In Bankruptcy

In the Matter of
CHRIST'S CHURCH OF THE GOLDEN RULE,
a corporation,

Bankrupt.

NOTICE OF APPEAL

To Theodore M. Monell:

You will please hereby take notice that Paul W. Sampsell, L. Boteler and Stewart McKee, the trustees in bankruptcy of the estate of the above named corporation, hereby appeal to the United

States Circuit Court of Appeals for the Ninth Circuit from the order made and entered herein on September 24, 1946, confirming the order of Referee in Bankruptcy Burton J. Wyman, made and entered on May 27, 1946, allowing to Theodore M. Monell the sum of Twenty-Five Hundred (\$2500.00) Dollars as counsel fees.

Dated October 14, 1946.

/s/ PAUL W. SAMPSELL,

/s/ L. BOTELER,

/s/ STEWART McKEE,

Trustees in Bankruptcy.

IRVING M. WALKER,

GRAINGER AND HUNT,

By /s/ REUBEN G. HUNT,

Attorneys for Trustees in
Bankruptcy.

[Endorsed]: Filed Oct. 14, 1946. C. W. Calbreath, Clerk. [109]

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH THE TRUSTEES IN BANK-
RUPTCY INTEND TO RELY ON THE
APPEAL.

Paul W. Sampsell, L. Boteler and Stewart McKee, the Trustees in Bankruptcy of the Estate of the above-named corporation, present herewith their concise statement of points on which they intend

to rely on their appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled court made and entered herein on September 24, 1946, confirming an order of Referee in Bankruptcy Wyman made and entered on May 27, 1946, awarding counsel fees in the sum of \$2500.00 to Theodore M. Monell, as follows:

1. The award was made pursuant to the terms of two conditional sales contracts entered into with the bankrupt corporation prior to bankruptcy, which provided for a "reasonable fee" to be paid to the counsel for the holders of the contracts. Mr. Monell was such counsel, but the award made to him by the Referee, and confirmed by the District Court, was unreasonable and excessive, in view of the nature of the services performed, and was an abuse of the discretion vested in such matters in the Referee and the [110] District Judge.

2. The award made by the Referee, confirmed by the District Judge, was based upon the premise that the Trustees in Bankruptcy were without legal rights under said conditional sales contracts in connection with the properties covered thereby, and Theodore M. Monell benefited the bankrupt estate by cooperation and non-insistence upon the enforcement of his clients' legal rights to take back the property because of default, whereas, under the California law, which federal courts will follow in matters of this kind, the holders of the conditional sales contracts held title for security only to assure the payment of the purchase price, and the Trustees

in Bankruptcy, as successors to the bankrupt corporation, had the right to the possession and use of the property, subject only to the seller's remedies in case of default, and were, in a practical and a legal sense, the beneficial owners of the properties. The properties were in the actual possession of the bankruptcy court, through its officers the Trustees in Bankruptcy, and the bankruptcy court had ample power to protect the interests of the bankrupt estate therein, by restraining the holders of the contracts from taking any untoward action and by giving the Trustees a reasonable time in which, either to pay off the balance due under the contracts by sale or otherwise, or to return the properties to such holders. Any such co-operation or non-insistence on the part of Mr. Monell did not contribute to the bankrupt estate anything the Trustees did not have the right to insist upon even in the face of opposition on his part.

3. The award made by the Referee, confirmed by the District Judge, was based upon the premise that the bankrupt estate, through the co-operation of Mr. Monell and his non-insistence upon the enforcement of his clients' legal rights to take back the property because of default, benefited to the extent of in excess of \$40,000.00, whereas the fact is that the only benefit the bankrupt [111] estate derived out of the transaction was the realization of an equity of some \$11,500.00, out of which is to be paid the fee finally awarded to Mr. Monell, and this equity was realized through the efforts of the counsel for the Trustees and such counsel are en-

titled to be paid a reasonable fee for their services out of such equity.

4. The award of \$2500.00 to Mr. Monell was unreasonable and excessive in that the record shows that the legal services performed by him were simple in character, little time was spent, were only those required to establish admitted claims in court by appropriate pleadings without contest. No litigation or controversy was involved, claims of such clients being conceded without contest. The reasonable value of such services is not to exceed \$500.00.

5. The Referee, and the District Judge, erred in basing the award upon the benefit principle to the bankrupt estate. The award should have been based upon the benefit to Mr. Monell's clients, the value of his services to them, so that they would not be required to pay themselves. Such was the purpose of the provisions in the conditional sales contracts providing for such counsel fees. The reasonable value of the services of Mr. Monell to his clients was not in excess of \$500.00, since such services were simple in character, did not require much time, were only those required to establish admitted claims in court by appropriate pleadings, no litigation or controversy was involved, and the money claims of such clients were conceded without contest and provided for by the court. The reasonable value of such services to said clients is not in excess of \$500.00.

6. The Referee and the District Judge erred in giving very large weight, in fixing the fee, to the

amount involved for Mr. Monell's clients, viz., some \$30,000.00, whereas other factors should have been given equal weight, such as the facts that little [112] time was spent, no litigation or controversy was involved, and the services performed were only those required to establish admitted claims in court by appropriate pleadings without contest. Taking into consideration all these factors, the reasonable value of Mr. Monell's services is not to exceed \$500.00.

Dated: October 14, 1946.

IRVING M. WALKER,
GRAINGER & HUNT,

By /s/ REUBEN G. HUNT,

Attorneys for Trustees in
Bankruptcy.

[Endorsed]: Filed Oct. 14, 1946. C. W. Calbreath, Clerk. [113]

In the Circuit Court of Appeals for the Ninth
Circuit

[Title of Cause.]

CONCISE STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF AND TO BE PRINTED.

For their concise statement of points on appeal on which the appellants intend to rely, the appellants adopt the Statement of Points heretofore filed

with the Clerk of the United States District Court for the Southern Division of the Northern District of California, and designate the same as their assignments of error.

The appellants hereby designate the entire record on appeal certified by the Clerk of the said District Court as necessary for the consideration of the appeal and to be printed. This particular document is to be printed as part of the record, in addition to those items already designated. All filing stamps shall appear in the printed record, but the titles of court and cause, and the names and addresses of attorneys appearing above the captions shall be omitted in printing.

Dated: October 14, 1946.

IRVING M. WALKER,

GRAINGER & HUNT,

By /s/ REUBEN G. HUNT,

Attorneys for Appellants.

Filed: Oct. 14, 1946,

C. W. CALBREATH,

Clerk. [114]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 36,408-R
In Bankruptcy

In the Matter of
CHRIST'S CHURCH OF THE GOLDEN RULE,
a corporation,

Bankrupt.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To Theodore M. Monell:

You are hereby notified that the following is a designation of the portions of the record, proceedings and evidence to be considered in the record on appeal by the trustees in bankruptcy herein to the Circuit Court of Appeals for the Ninth Circuit from that certain order of the above entitled court made and entered herein September 24, 1946, confirming the order of Referee in Bankruptcy, Burton J. Wyman, made and entered May 27, 1946, allowing to Theodore M. Monell counsel fees in the sum of Twenty-five Hundred Dollars (\$2500.00):

1. Certificate of Clerk of the United States District Court, Central Division of the Southern District of California, filed herein.

2. Order of Adjudication made and entered by the United States District Court for the Central

Division of the Southern District of California, filed herein.

3. Order of the United States District Court for the Central Division of the Southern District of California approving the trustees' bond, filed herein.

4. Order of the above-entitled court made and entered May 26, 1946, authorizing ancillary proceedings in the above entitled case and referring the administration of the ancillary estate to Burton J. Wyman, a Referee in Bankruptcy.

5. Petition of the trustees in bankruptcy for an order of sale of the Denton-James (Willits) sawmill, filed with Referee Wyman.

6. Order to show cause issued by Referee Wyman upon the filing of said petition.

7. Petition in reclamation filed with Referee Wyman by De Lancey Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, a corporation.

8. Order to show cause issued by Referee Wyman upon the filing of the said petition of reclamation.

9. Answer of trustees in bankruptcy to petition in reclamation of De Lancey Lewis et al, filed with Referee Wyman.

10. Answer of West Coast Redwood Corporation, a corporation, De Lancey Lewis and Doris B. Lewis, to the trustees' petition for an order of sale of the Denton-James (Willits) sawmill, filed with Referee Wyman.

11. Trustees' return of sale of real and personal property, filed with Referee Wyman.

12. Stipulation re Willits sawmill, filed with Referee Wyman.

13. Order of Referee Wyman clearing title and determining amounts due under liens and sale.

14. Petition of trustees for review of Referee's order by the Judge, filed with Referee Wyman.

15. Referee Wyman's certificate on review pursuant to such petition.

16. Letter dated September 16, 1946, from Reuben G. Hunt, attorney for Trustees in Bankruptcy, to Judge Michael J. Roche of the above entitled court.

17. Order of District Judge made and entered September 24, 1946, confirming order of Referee Wyman and awarding \$2500.00 counsel fees to Theodore M. Monell.

18. Trustees' notice of appeal.

19. Trustees' statement of points on which they intend to rely on appeal.

20. This designation of the record to be used on appeal.

Dated: October 14, 1946.

IRVING M. WALKER,
GRAINGER AND HUNT,

By /s/ REUBEN G. HUNT,
Attorneys for Trustees.

[Endorsed]: Filed Oct. 14, 1946. C. W. Calbreath, Clerk. [116]

[Title of District Court and Cause.]

AMENDMENT TO DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

To Theodore M. Monell:

You Are Hereby Notified that this is an amendment to the designation of the portions of the record, proceedings and evidence to be considered in the record on appeal by the Trustees in Bankruptcy herein to the Circuit Court of Appeals for the Ninth Circuit heretofore filed herein, from that certain order of the above entitled court made and entered herein Sept. 24, 1946, confirming the order of Referee in Bankruptcy Burton J. Wyman made and entered May 27, 1946, allowing to Theodore M. Monell counsel fees in the sum of \$2500.00, setting up three additional portions of the record to be included which were inadvertently omitted from the original designation:

15-a. Notice of motion for order clarifying approval contained in Referee's order now on review and directing that such approval be disregarded on the review.

15-b. Consent to order clarifying approval of order and motion supporting Referee's order fixing attorney's fee re Denton-James Sawmill.

15-c. Minute order of Court, Sept. 16, 1946, granting the above motion so consented to.

Dated: Oct. 14, 1946.

IRVING M. WALKER,
GRAINGER & HUNT,
By /s/ REUBEN G. HUNT,
Attorneys for Trustees.

[Endorsed]: Filed Oct. 14, 1946. C. W. Calbreath, Clerk. [117]

In the District Court of the United States, Southern
District of California, Central Division

No. 44,128-WM
In Bankruptcy

In the Matter of
CHRIST'S CHURCH OF THE GOLDEN RULE,
a Corporation,

Bankrupt.

CERTIFICATE OF CLERK

I, the undersigned, Edmund L. Smith, Clerk of the above-entitled Court, hereby certify as follows:

On November 1, 1945, the above-entitled corporation filed herein its original Petition for an arrangement with its creditors under the provision of Chapter XI of the National Bankruptcy Act of 1898, as amended; and thereafter, and in the said proceeding, on November 15, 1945, filed its Petition for adjudication as an ordinary bankrupt, and thereafter and on November 19, 1945, the said corporation was duly adjudicated a bankrupt upon said

Petition so filed November 15, 1945, and further proceedings in the case were referred to Benno M. Brink, a Referee in Bankruptcy of the Court, and such proceedings are now pending in said Court.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the above-entitled Court this 26th day of February, 1946.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ WM. E. COOK,
Deputy Clerk.

[Endorsed]: Filed Oct. 14, 1946. C. W. Calbreath, Clerk. [118]

[Title of District Court and Cause.]

ORDERS OF ADJUDICATION AND GENERAL REFERENCE

At Los Angeles, in said District, on November 19, 1945,

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and

It having been adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings herein-after mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 44,128-WM.

Title of Proceedings: Christ's Church of the Golden Rule, a Corporation.

Filed: 11-15-45.

Referee: Benno M. Brink, Esq., Los Angeles, Calif.

[Endorsed]: Filed Nov. 19, 1945.

[Seal] WM. C. MATHES,
U. S. District Judge.

A true copy, attest, etc., Mar. 19, 1946.

EDMUND L. SMITH,
Clerk.

By /s/ R. BETZ,
Deputy.

[Endorsed]: Filed Oct. 14, 1946.

C. W. CALBREATH,
Clerk. [119]

[Title of District Court and Cause.]

CERTIFIED COPY OF ORDER APPROVING
TRUSTEES' BOND

At a Court of Bankruptcy, held in and for the Southern District of California at Los Angeles this 5th day of January, A.D. 1946.

Before Benno M. Brink, Referee in Bankruptcy.

It appearing to the Court that Paul W. Sampsell, L. Boteler and Stewart McKee of Los Angeles and in said District have been duly appointed Trustees of the estate of the above named Bankrupt, and have given a bond with sureties for the faithful performance of their official duties, in the amount fixed by the creditors (or by order of the Court), to wit in the sum of One Hundred Fifty Thousand and no/100 (\$150,000.00) Dollars, It Is Ordered that the said bond be, and the same is hereby approved.

BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 5, 1946, at 31 minutes past 9 o'clock a.m. Benno M. Brink, Referee, Florence Robinson, Clerk.

United States of America,
Southern District of California,
Central Division—ss.

I do hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears of record in my office.

In witness whereof, I hereunto set my hand this
7th day of Jan., 1946.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed Oct. 14, 1946. C. W. Calbreath, Clerk. [120]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 36,408-R
In Bankruptcy

In the Matter of
CHRIST'S CHURCH OF THE GOLDEN RULE,
a Corporation,

Bankrupt.

WAIVER OF RIGHT TO DESIGNATE FURTHER PORTIONS OF RECORD ON APPEAL

The undersigned attorney for respondent in the above matter, being the appeal by the trustees in bankruptcy herein to the Circuit Court of Appeals for the Ninth Circuit from that certain order of the above entitled court duly given, made and entered herein on September 24, 1946, confirming the order of referee in bankruptcy allowing counsel fees, hereby adopts the designation of contents of record on appeal and amendment to designation of contents of record on appeal as filed herein by Irving M. Walker and Grainger and Hunt, attor-

neys for the trustees, as the record on appeal in the above matter for respondent, and waives the right to designate any further portions of the record to be considered on said appeal.

Dated: October 15, 1946.

/s/ THEODORE M. MONELL,
Attorney for Respondent.

[Endorsed]: Filed Oct. 15, 1946. C. W. Calbreath, Clerk. [121]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 121 pages, numbered from 1 to 121, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Christ's Church of the Golden Rule, a Corporation, Bankrupt, No. 36408-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$15.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this day of October, A.D. 1946.

C. W. CALBREATH,
Clerk. [122]

[Endorsed]: No. 11458. United States Circuit Court of Appeals for the Ninth Circuit. Paul W. Sampsell, L. Boteler and Stewart McKee, Trustees of the Estate of Christ's Church of the Golden Rule, a Corporation, Bankrupt, Appellants, vs. Theodore M. Monell, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 28, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11458

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, L. BOTELER and STEWART McKEE,
Trustees of the Estate of Christ's Church of the Golden
Rule, a corporation, bankrupt,

Appellants,

vs.

THEODORE M. MONELL,

Appellee.

APPELLANTS' OPENING BRIEF.

IRVING M. WALKER,
GRAINGER & HUNT,
354 South Spring Street, Los Angeles 13,
Attorneys for Appellants.

FILED

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No. 11458

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, L. BOTELER and STEWART MCKEE,
Trustees of the Estate of Christ's Church of the Golden
Rule, a corporation, bankrupt,

Appellants,

vs.

THEODORE M. MONELL,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Statement of the Case.

This is an appeal from an order of a District Judge of the Northern District of California, affirming an order of a Referee in Bankruptcy awarding to the appellee, as counsel for certain conditional sales contract claimants, an attorney's fee in the sum of \$2500.00 to be paid out of the bankrupt estate for legal services in the bankruptcy proceedings of Christ's Church of the Golden Rule, a corporation, pursuant to the terms of such contracts.

II.

Statement of Pleadings and Facts Showing
Jurisdiction.

The bankruptcy was commenced on November 1, 1945, in the District Court of the United States, Southern District of California, Central Division, as the court of bankruptcy of primary jurisdiction, by the filing by the corporation of an original petition under Chapter XI of the National Bankruptcy Act of 1898, as amended, for an arrangement between the corporation and its creditors. [Tr. p. 150.] Thereafter and on November 19, 1945, upon its voluntary petition filed in the same case, the corporation was adjudicated a bankrupt and the case was referred to a referee in bankruptcy for further proceedings. [Tr. p. 146.] On January 4, 1946 the appellants were appointed trustees in bankruptcy of the estate and qualified as such on January 5, 1946. [Tr. p. 148.] On November 26, 1945, ancillary proceedings in bankruptcy in aid of the said primary court were commenced and thereafter prosecuted in the District Court of the United States for the Southern Division of the Northern District of California, as an ancillary court of bankruptcy, by the filing of a petition by the primary receivers in bankruptcy appointed by the primary court and the making of an order by the ancillary court appointing ancillary receivers for last named district, and referring further proceedings to Hon. Burton J. Wyman, a Referee in Bankruptcy of said ancillary court. [Tr. p. 2.] Sec. 2 (20) of the Bankruptcy Act provides for

ancillary proceedings in courts of bankruptcy in aid of a receiver or trustee appointed in any other court of bankruptcy. Sec. 24a of the Bankruptcy Act invests in circuit courts of appeal appellate jurisdiction from courts of bankruptcy from proceedings in bankruptcy.

III.

Opinion of the Court Below.

The District Judge did not render any opinion. The Referee in Bankruptcy, as a part of his certificate on review from the order of allowance, rendered an opinion. [Tr. p. 94.]

IV.

Statement of Facts.

At the time of the commencement of the bankruptcy proceedings on November 1, 1945, the bankrupt was in possession of, and operating through its agent, William W. Denton, a sawmill located about ten (10) miles Northwest of Willits, Mendicino County, California. The bankrupt's title to the real estate and to some of the equipment, was subject to two conditional sales contracts, upon which there were balances due, one covering the real estate and held by Delancy Lewis and Doris B. Lewis, his wife, and the other covering certain equipment and held by West Coast Redwood Corporation, a corporation. The attorney for the holders of these conditional sales contracts was Theodore Monell.

The Trustees in Bankruptcy, on March 29, 1946, filed with the referee a petition for the sale of the sawmill. [Tr. p. 4.] The said conditional sales contracts were described in the said petition. The referee thereupon

issued an order directing the holders of the said conditional sales contracts to appear before him and show cause at a time and place specified, why the said sawmill should not be sold, either free and clear of claims, or subject to liens and claims. [Tr. p. 11.] Thereafter and on April 15, 1946, the said conditional sales contract-holders filed their answer to such petition. [Tr. p. 36.]

Thereafter, on April 2, 1946, the said conditional sales contract-holders, through their said attorney, filed with the referee their petition in reclamation of the property covered by said conditional sales contracts. [Tr. p. 12.] The prayer of such petition was that the property should either be returned to said conditional sales contract-holders, or the Trustees in Bankruptcy should pay to them the balances due under the contracts. It was also prayed in said petition in reclamation that \$3500.00 be awarded to Theodore Monell as attorneys' fees, in line with a provision in the said contracts to the effect that in the event any action was brought by the holders of the contracts to enforce the terms thereof and they should prevail in such action, they should be entitled to *reasonable* attorneys' fees to be fixed by the court and taxed as a part of the course of suit. Of this amount, \$500.00 was claimed under the Lewis contract, and \$3000.00 under the West Coast Redwood Corporation contract. On April 4, 1946, the Referee issued, pursuant to said petition in reclamation, an order to show cause directed against the Trustees in Bankruptcy. [Tr. p. 34.] On April 9, 1946, the Trustees in Bankruptcy filed their answer to said petition in reclamation. [Tr. p. 35.]

The said Trustees' petition for leave to sell, and the said petition in reclamation, and the respective answers thereto,

were heard before the Referee on April 15, 1946. [Tr. p. 80.] At that time, the balances claimed by said conditional sales contracts holders to be due under their contracts were agreed to by the Trustees in Bankruptcy. The Referee fixed June 1, 1946, as the time limit within which the properties should either be sold by the Trustees in Bankruptcy and these balances and other liens paid out of the proceeds, or the properties should be returned to the holders of the conditional sales contracts. There was some rolling stock involved in the sale upon which others held unpaid conditional sales contracts. [Tr. p. 62.] Some time was required thereafter by appellants' counsel in which to prepare a written order that in form satisfied all the parties. Such an order was finally prepared and presented to the Referee on May 27, 1946, at which time he signed and entered the order above mentioned, clearing title, and determining amounts due under liens and of sale. In such order he fixed \$2500.00 as the compensation of Theodore Monell, as attorney for Delancy Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, a corporation, for legal services rendered to them herein. [Tr. p. 51.]

Thereafter the June 1st time limit was extended by stipulation of these parties to June 17, 1946. [Tr. p. 48.] In the meantime, the Trustees in Bankruptcy effected a final sale of the sawmill for a gross price of \$52,000.00. [Tr. pp. 98-99. Note No. 3.] An escrow for the completion of the sale and the payment of the balances due these conditional sales contract-holders was opened with Title Insurance and Guaranty Co., of San Francisco, and was finally completed and closed with the payment of the balances due Mr. Monell's clients.

NOTE: *The Referee inadvertently included in his certificate on review a return of sale of real and personal property [Tr. p. 71, 40] that does not have any bearing upon the controversy here. The sale therein referred to collapsed and was never confirmed for reasons that are unimportant here. The property was finally sold, and the sale confirmed for \$52,000.00, as appears from Note No. 3 in the Referee's Certificate [Tr. p. 98] and the letter of Reuben G. Hunt to Judge Roche of September 15, 1946. [Tr. p. 114.] The said return of sale should, therefore, be disregarded, in determining the net amount received by the bankrupt estate from the transaction. This net amount was about \$11,500.00 before the payment of any fee to Mr. Monell, as appears from the said letter. [Tr. p. 114.] The pertinent portion of the letter reads as follows:*

"This morning, based upon information furnished to me by the title company handling the escrow in connection with the sale of the Denton-James (Wil-lits) Sawmill, I stated to you in open court that, if the \$2500 fee was allowed to Mr. Monell, the bankrupt estate would receive a net of about \$3800 from the transaction. After checking again with the title company I find that this statement was erroneous. It left out of consideration the original deposit of \$5200 with the trustees by the purchasers. If the \$2500 fee is allowed, the estate will receive a total of \$8919.19, instead of \$3800.00. In other words the maximum available from the transaction for the final amount allowed Mr. Monell, and for the estate, is about \$11,500.00. In the trustee's brief it is stated that the maximum would be about \$12,000.00."

V.

Questions Presented.

The sole question presented is whether or not, under all the circumstances of this case, the award of \$2500.00 to Theodore Monell was unreasonable, excessive, and an abuse of discretion on the part of the lower court; and, if so, to what extent the award should be modified to provide a reasonable fee.

VI.

Specification of Error.

The lower court erred in allowing Mr. Monell \$2500.00; and a reasonable allowance, if all the factors which go to make up a reasonable fee are taken into consideration, would have been not less than \$500.00 and not more than \$1000.00.

VII.

Summary of the Argument.

A. *Attorney's Fees Allowed in Bankruptcy Proceedings Must Always be Reasonable.*

B. *The Factors Which Make Up a Reasonable Fee Show That the Fee Allowed Was Unreasonable.*

C. *The Amount of the Fee Should be Based Upon What Mr. Monell's Services Were Worth to His Clients and Not Upon the Cooperation He Gave the Trustees.*

D. *Mr. Monell's Clients Did Not Have Absolute Title and the Trustees Had the Right to Sell the Property and Pay Them Off Even if He Had Not Cooperated by Extending by Stipulation the Time For Such Sale.*

E. *The Bankrupt Estate Benefited by the Transaction to the Extent of a Gross of \$11,500.00 Instead of \$40,000.00 as Set Up by the Referee in His Certification on Review.*

F. *The Amount Collected by Mr. Monell For His Clients Should Not Be Given Much Weight in Determining a Reasonable Fee.*

G. *The Amount Awarded Mr. Monell Was Never Approved by the Trustees or Their Counsel.*

VIII.

ARGUMENT.

A. Attorneys' Fees Allowed in Bankruptcy Proceedings Must Always Be Reasonable.

An attorney's fee allowed in bankruptcy must always be *reasonable*. *In re Owl Drug Co.*, D. C., Nev. 31, A. B. R., N. S., 763, 16 F. Supp. 139. The results achieved constitute the factor of greatest determinative weight. *In re Hoffman*, D. C., Wis. 23 A. B. R., 19, 173 F. 234. The results achieved here by Attorney Monell in protecting his clients, consisted of securing for his clients the admitted balances due them under their conditional sales contracts without contest, instead of their being required to take the properties back. What, then, is a reasonable fee to be allowed him for such services? Under the circumstances, we submit that any allowance in excess of from \$500.00 to \$1000.00 would be excessive.

It is true that the Referee is vested with a wide discretion in making allowances of attorney's fees, but such discretion can be abused and we contend that here it has

been abused. Appellate courts will reduce the allowances where such discretion has been abused. While the amount is left to the sound discretion of the referee, this power is not discretionary in the sense that the Referee is at liberty to award more than a fair and reasonable compensation. *In re Owl Drug Co., supra.*

The Act of Congress of June 7, 1934, Section 3, provides that the compensation allowed a receiver or trustee, or an attorney for a receiver or trustee, shall in no case be excessive or exorbitant, and the court, in fixing such compensation, shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein. We think this principle should be applied here with respect to the final amount to be allowed to Mr. Monell.

We contend that a reasonable fee here for Mr. Monell would be not less than \$500.00 and not more than \$1000.00. By way of analogy, we refer to probate fees in California. The services performed by Mr. Monell were ordinary. None of them were extraordinary. The amount claimed by his clients was conceded and the collection of the money was certain. It only remained for Mr. Monell to prepare and file in court the papers necessary to secure the money. The amount of money involved was about \$32,000.00. In a California probate estate, where the amount of ordinary services of an attorney for an executor or an administrator would be at least twice the amount required of Mr. Monell here, the fee for such ordinary services in an estate of that size would be \$1020.00. Cal. Prob. Code, Secs. 901, 910.

B. The Factors Which Make Up a Reasonable Fee Show That the Fee Allowed Was Unreasonable.

In the determination of the amount to be allowed out of a bankrupt estate to an attorney for services, the following factors may be taken into consideration:

- (1) The labor, trouble and time involved.
- (2) The intricacy of the questions involved.
- (3) The character and importance of the matter.
- (4) The learning, skill and experience exercised.
- (5) The opposition encountered.
- (6) The results achieved.
- (7) The size of the estate and its ability to pay.
- (8) The opinion evidence touching the reasonableness of the fee requested.
- (9) Whether a fee was certain or contingent.
- (10) The economical spirit of the bankruptcy act itself.

In re Detroit International Bridge Co., C.C.A. 6, 111 F. (2d) 235, 42 A.B.R., N.S., 856;

In re Barceloux, C.C.A., 9, 74 F. (2d) 288, 27 A.B.R., N.S., 686;

Steere v. Baldwin Locomotive Works, C.C.A. 3, 98 F. (2d) 889, 38 A.B.R., N.S., 37;

Schnader v. Reading Hotel Co., C.C.A. 3, 105 F. (2d) 572, 48 A.B.R., N.S., 69;

In re Herald-Post, DC, Ky., 21 F. Supp. 231, 35 A.B.R., N.S., 94.

The transcript of record in the case discloses the nature of the services performed by Mr. Monell. These consist of four classes: (1) conferences; (2) appearances in court; (3) preparation and filing of papers; and (4) and examination by Mr. Monell of papers served and filed by the trustees.

(1) *Conferences*: The only evidence upon this subject is the statement of Mr. Monell "There have been numerous discussions." [Tr. p. 86.] There is nothing to indicate how many discussions, or of what nature, or of what importance, or how much time was spent.

(2) *Appearances in court*: One, that of April 15, 1946. [Tr. p. 80.]

(3) *Preparation of papers*: A list follows:

1. Answer of West Coast Redwood Corporation and De Lancey Lewis and Doris B. Lewis to Petition for an Order of Sale (Denton Sawmill). [Tr. p. 36.]
2. Petition in Reclamation. [Tr. p. 12.]
3. Order to Show Cause and Setting Day of Hearing. [Tr. p. 34.]

(4) *Papers Examined*:

1. Petition for an Order of Sale (Denton Sawmill). [Tr. p. 4.]
2. Order to Show Cause (Denton Sawmill). [Tr. p. 11.]
3. Answer of Trustees to Petition in Reclamation. [Tr. p. 35.]
4. Order Clearing Title, Determining Amounts Due Under Liens, and of Sale. [Tr. pp. 51, 86.]
5. Stipulation *re* Willits Sawmill. [Tr. p. 149.]

When we examine the facts to be taken into consideration in determining a reasonable fee for Mr. Monell under such factors, we find:

1. *The labor, trouble and time involved.* The labor and trouble was little, as appears from the record. The procedure was merely routine. No contest or litigation was involved. The amount sought by Mr. Monell's clients was agreed to by the Trustees. The situation was akin to the preparation and filing of the necessary papers to establish an admitted claim against a bankrupt or a probate estate. The time involved is not disclosed by the record, but it could not have been much under the circumstances.

2. *The intricacy of the questions involved.* None of the questions involved were intricate, complex or vexatious. They were all simple.

3. *The character and importance of the matter in hand.* This was either the reclaiming of property or the securing of a balance due thereon of about \$32,000.00, without contest, and with certainty of success in either event.

4. *The learning skill and experience involved.* The ordinary intelligence of a lawyer who has had experience in bankruptcy practice was all that was required.

5. *The opposition encountered.* None.

6. *The results achieved.* The collection of about \$32,000.00 upon an admitted claim from a solvent debtor, ready, able and willing to pay.

7. *The size of the estate and its ability to pay.* There inadvertently appears in the record, in connection with the certificate on review of the Referee [Tr. p. 71] a return of sale of real and personal property to A. J.

Barbee for \$66,600.00. [Tr. p. 40.] This sale was never confirmed for reasons which are unimportant here. At a new sale the property was sold for a gross of \$52,000.00, and the new sale was confirmed, as appears from the Referee's Certificate on Review written by Reuben G. Hunt, counsel for the trustees, to Judge Roche of the lower court on September 16, 1946 [Tr. p. 114 and "IV Statement of Facts" above]. The maximum amount left over for the bankrupt estate after the payment of all liens, including those of Mr. Monell's clients, and before the payment of any fee to Mr. Monell, was about \$11,500.00. There were other liens besides those of Mr. Monell's clients to be satisfied out of the gross purchase price of \$52,000.00, as appears from the Referee's order of May 27, 1946. [Tr. p. 51.] It seems to us that a charge of \$2500.00 out of \$11,500.00 to take care of Mr. Monell's fee is all out of proportion to the ability of the bankrupt estate to pay especially since the trustees and their counsel are entitled to be paid out of this fund for their services in creating it.

8. *Opinion evidence touching the reasonableness of the fee requested.* None was offered.

9. *Whether the fee was certain or contingent.* The fee was certain and not contingent. Mr. Monell would be paid by the bankrupt estate if it kept and sold the property; and by his clients if it was returned to them.

10. *The economical spirit of the bankruptcy act.* A charge of \$2500.00 against a fund of \$11,500.00, particularly in view of the fact that the trustees and their counsel are entitled to be paid out of this fund for their services in connection with its creation, would violently upset any economical spirit.

C. The Amount of the Fee Should be Based Upon What Mr. Monell's Services Were Worth to His Clients and Not Upon the Cooperation He Gave the Trustees.

We contend that any award to Mr. Monell must be based upon what his services were worth to his clients, and cannot be based upon the indirect benefit the bankrupt estate may have received as a result of his cooperative attitude. The theory of the provision in the conditional sales contracts for the payment of a fee is that the holders of the contracts will be reimbursed for the money they would otherwise be reasonably required to pay him for his services. This was not a case where the result hinged upon the collection of money. Mr. Monell's clients were safe in any event. If they did not get their money they got back their property of equivalent value. In a simple collection of an agreed amount of \$32,000.00, without contest, from a solvent debtor it seems to us inconceivable that Mr. Monell's services to his clients were worth \$2500.00, or any more than between \$500.00 and \$1000.00.

D. Mr. Monell's Clients Did Not Have Absolute Title and the Trustees Had the Right to Sell the Property and Pay Them Off Even if He Had Not Cooperated by Extending by Stipulation the Time for Such Sale.

The Referee apparently took the view that Mr. Monell's clients had absolute title to the properties involved, that the Trustees in Bankruptcy had no interest therein, and that Mr. Monell's clients could have insisted upon its return to them, but out of good grace and in a spirit of cooperation they permitted the properties to be sold by

the Trustees and the bankrupt estate benefited thereby by the stipulation for the extension of the time originally set. (Tr. p. 48.) We think this is an erroneous conception of the law.

The nature of the title of a holder of a conditional sales contract is set forth in the case of *County of San Diego v. Davis*, 1 Cal. (2d) 145, where the court said:

"In conditional sale, the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. Both as a practical and a legal matter the buyer is the beneficial owner. (See *Walker v. Houston*, 215 Cal. 342 (12 Pac. (2d) 952, 87 A. L. R. 917)."

The case of *In re Ideal Laundry*, 30 F. Supp. 719, cited by the Referee in his opinion, makes no reference to the case of *County of San Diego v. Davis*, 1 Cal. (2d) 145. Judge Lindley in the *Ideal Laundry* case follows the theory of the case of *In re Ideal Laundry*, C. C. A. (2d) 29 A. B. R. 498, 79 F. (2d) 326, later decided, whereas it was held in a reclamation proceeding under the old Section 57b of the Bankruptcy Act that property held by a conditional vendor is the property of the conditional vendor until the contract price is paid, and until such payment the vendor had no interest, and that a person or reclamation must be promptly granted. This ruling was later repudiated by the same circuit in the case of *In re Illinois Plaster Ice Service*, C. C. A. (2d), 41 A. B. R. N. S. 11, 100 F. (2d)

913, wherein the court held that the bankrupt court had the power to give trustees in bankruptcy a reasonable time to elect whether to pay up the balance due on a conditional sales contract, or return to the vendor the property covered thereby. To the same effect: *In re Burgemeister Brewing Co.*, C. C. A. 7, 31 A. B. R., N. S., 446, 84 F. (2d) 388; *Lincoln Alliance Trust Co. v. Dye.*, C. C. A. (2d), 41 A. B. R., N. S., 475, 108 F. (2d) 38; *Barth v. Pearlstein*, C. C. A. (2d), 49 A. B. R., N. S., 411, 128 F. (2d) 253.

Even if Mr. Monell had not cooperated by extending the time limit and had insisted upon compliance with the court order limit of June 1, 1946, the bankruptcy court had ample power, in view of the authorities we have cited, to have extended the limit for a reasonable time under the circumstances presented. It is settled that a referee in bankruptcy may reconsider and vacate his previous orders. *Pfister v. Northern Illinois*, 317 U. S. 144, 51 A. B. R., N. S., 99, 63 S. Ct. 133, 87 L. Ed. 146. Mr. Monell's clients benefitted by the extension of the time limit to June 17, 1946 because a sale was pending on June 1st that would result in the payment to them of the balances due. If they had opposed the extension they would have been subject to a long and expensive litigation that would probably have resulted only in their receiving money and not property. Furthermore, the Referee's order of May 27, 1946 [Tr. p. 51] provided for the payment of interest on the balances due up to the time of payment. Any cooperation of Mr. Monell, therefore, was for the interests of his clients.

E. The Bankrupt Estate Benefitted by the Transaction to the Extent of a Gross of \$11,500.00 Instead of \$40,000 as Set Up by the Referee in His Certificate on Review.

We do not know from where the Referee secured the \$40,000.00 figure [Tr. p. 98-99], unless from the appraisal of \$42,000.00. [Tr. pp. 72, 85.] At all events, he assumes that the gross value of the property, subject to liens, was the total value to the bankrupt estate instead of the value of the equity, which is the true value. And this true value, as we have seen, was but \$11,500.00, after paying off all conditional sales contracts including those held by persons other than Mr. Monell's clients upon other property included in the sale. This \$11,500.00 figure is disclosed by the letter of Reuben G. Hunt to Judge Roche of the lower court dated September 16, 1946 [Tr. p. 114, and above under "IV. Statement of Facts".]

F. The Amount Collected by Mr. Monell for His Clients Should Not Be Given Much Weight in Determining a Reasonable Fee.

The Referee, and Mr. Monell, stress the amount involved as the most important of all of the factors in the determination of the allowance to be made. The allowance of \$2500.00 was a little less than 8% of the amount collected upon an admitted claim with a certainty of payment. Suppose, with the same amount of work and under the same conditions, the amount involved were \$100,000.00, would a fee of 8% of that amount, or \$8,000.00, be reasonable? The amount involved is only one of the factors that goes to make up a reasonable fee; and, as we have seen above in Point A of this argument, is only one of a number of factors.

G. The Amount Awarded Mr. Monell by the Lower Court Was Never Approved by the Trustees or Their Counsel.

Some question arose in the lower court whether or not, by reason of an inadvertent wording of the approval of the order of the Referee signed by counsel for the Trustees at the end of the order of the Referee making the award [Tr. p. 64], the Trustees had consented to the allowance. This was cleared up by a motion made before the lower court by the Trustees for an order clarifying this approval and directing that it be disregarded. [Tr. p. 116.] The motion was granted [Tr. p. 133] with the consent of Mr. Monell. [Tr. p. 128.]

IX.

Conclusion.

We submit that under all the circumstances of this case the award of \$2500.00 was excessive, unreasonable, and an abuse of the discretion invested in lower courts in matters of this kind and that the award should be reduced to a figure somewhere between \$500.00 and \$1000.00.

Dated: January 22, 1947.

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